Supreme Court, U.S.
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Nº. 06-308 JUN 26 2006

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In The
Supreme Court of the United States

TROY R. STUART,
Petitioner,

v.

JULIUS WILSON, WARDEN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI with Appendix

* Nathan A. Ray
ATTORNEY AT LAW
137 South Main Street
Suite 201, Delaware Building
Akron, OH 44308

(330) 253-7171

* *Counsel of Record*
Counsel for Petitioner

June, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

IS THERE A PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS TO A MINOR CHILDS OUT OF COURT STATEMENTS WHICH WOULD PERMIT A CONVICTION BASED SOLELY UPON HEARSAY TESTIMONY WHEN AN APPELLATE COURTS REVIEW IS LIMITED TO THE FIVE FACTORS SET FORTH IN *IDAHO V. WRIGHT*

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OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported as *Stuart v. Wilson*, Warden, 442 F.3d 506 (C.A. 6th, 2006). (Appendix A) (hereinafter cited as App.) The opinion of the United States District Court, Northern District of Ohio, Eastern Division, is unreported and is reprinted in the appendix. (App. B)

JURISDICTIONAL STATEMENT

The Petitioner's convictions and sentences were affirmed by the Sixth Circuit Court of Appeals on March 27, 2006, when the Court issued its opinion.

The jurisdiction of this Court to review the decision of the Sixth Circuit Court of Appeals is invoked pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

This case involves one Amendment to the United States Constitution:

A) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

This is an appeal by a state prisoner from the Sixth Circuit Court of Appeals which affirmed the decision of the United States District Court denying a Writ of Habeas Corpus.

Petitioner Stuart was indicted in October, 1999, for the offenses of two counts of rape by force of a victim under the age of 13 years and Gross Sexual Imposition of a victim under the age of thirteen. Each of the counts set forth in the indictment related to a single alleged victim, ("D.S."), Petitioner's nephew, the son of Petitioner's older brother. The indicted offenses were alleged to have occurred between August 1, 1996 and August 7, 1999.

Prior to trial, on February 4, 2000, the state filed a notice of its intention to use D.S.'s out of court statements as evidence at trial herein, with the intention of introducing these alleged statements through other witnesses, pursuant

to Ohio Evid.R. 807. On February 10, 2000, Defendant filed a Motion in Opposition to this request by the state. A hearing was held on February 17 and February 18, 2000.

At the hearing, D.S. indicated that he could count and say the alphabet, and he generally indicated that he knew what it meant to tell a lie, and what the consequence was for telling a lie. However, he was unable to say what the Court's job is, or what that of the defense attorney is. The Court found D.S. competent to testify at the hearing.

When D.S. was called as a witness at the hearing he refused to say anything when asked what Petitioner had allegedly done to him. On cross-examination, D.S. could not answer when asked by counsel for Petitioner why he would not say what had happened to him. When further pressed to answer on cross-examination, Dylan repeatedly answered "I don't know." The trial court than ruled that D.S. was unavailable to testify, and that his statements to

others were admissible as exceptions to the hearsay rule. At the hearing, the state than presented five witnesses. These included Detective Tera Johnstonbaugh, Lorin Stuart, D.S.'s father, Lisa Stuart, D.S.'s mother, Susan Burgess, D.S.'s aunt and Cindy Hailey, D.S.'s cousin.

Lorin Stuart, the victim's father, testified that, on October 5, 1999, he spoke with Susan Burgess at her house. At that time she advised him that in June, 1996, while she was babysitting D.S. she saw him playing with himself. When she asked D.S. why he was doing this, he responded that "...because my brother Troy Stuart does it." Later on that same that day, Lorin questioned D.S. concerning any improper touching, at which time D.S. said that Uncle Troy had been touching him. At this time Lorin testified that he "...went kind of crazy" and that this was in front of D.S. who would have seen his reaction.

Lisa Stuart, the victim's mother, testified that on October 5, 1999, right after her husband Lorin had questioned D.S., that she questioned him also concerning the abuse. At the time that she questioned him, D.S. stated that the abuse did happen, and that he told her that he was sorry. She further testified that in June of 1998, a CSB worker came to her house and wanted to talk to her two sons, including D.S. about an allegation of abuse by Petitioner Stuart. At that time both boys denied that there had been any abuse by Petitioner.

Susan Burgess, D.S.'s aunt, testified that in 1996, she was not sure of the month, that she saw D.S. with his hand down inside of his diaper. She told him to quit that and that D.S. had indicated that Uncle Troy does this. When this occurred, both Petitioner Stuart as well as Lorin Stuart were present. D.S.'s father replied "[t]ell Aunt Susie

that's what makes it grow." This incident was never mentioned again until October 5, 1999.

Cindy Hailey, the daughter of Susan Burgess and D.S.'s cousin, testified that on March 18, 1998, while she was babysitting D.S., she saw him playing with himself. When she questioned D.S. about this he stated that Uncle Troy does it. She further testified that D.S. told her that Petitioner Stuart kissed his pee-pee and played with his butt hole. Ms. Hailey did not tell anyone about this incident except for her mother Susan until October 6, 1999.

Terra Johnstonbaugh, the investigating detective in this case, testified that she met with D.S. on October 5, 1999, at which time she interviewed him. This interview took place after both D.S.' parents had questioned him. When the detective first interviewed D.S. he did not indicate that any oral sex had taken place. It was not until the interview was over and Detective Johnstonbaugh talked

to the parents that she became aware of it and proceeded to return to the interview room to discuss this with D.S. The interview of Detective Johnstonbaugh with D.S. was not recorded by either video or audio recording.

At trial, the state called only four witnesses in its case in chief, and one witness in rebuttal. These included Detective Tera Johnstonbaugh, Lorin Stuart, Lisa Stuart and Cindy Hailey. The state chose not to call as a witness Susan Burgess. All four of the witnesses testified as to what D.S. had told them. Without the hearsay testimony of these four witnesses Petitioner Stuart could not have been convicted of these crimes. Petitioner Stuart was convicted of these charges based only on hearsay testimony that he never had the opportunity to challenge, and upon which there was no independent proof of the sexual act.

At the conclusion of the trial Petitioner Stuart was convicted of all counts as alleged in the indictment. The

trial court sentenced Petitioner Stuart to the mandatory term of life imprisonment.

PRESERVATION OF FEDERAL QUESTION

Petitioner raised the claim that the trial court had improperly admitted the hearsay testimony of the child witness in the Ohio and Federal Courts below.

REASONS FOR GRANTING THE WRIT

AN APPELLATE COURTS REVIEW OF PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS OF HEARSAY STATEMENTS OF A MINOR CHILD, WHICH ARE THE ONLY BASIS FOR A CONVICTION FOR RAPE AND GROSS SEXUAL IMPOSITION, CANNOT BE LIMITED TO THE FIVE FACTORS SET FORTH IN *IDAHO V. WRIGHT*

In this case, the exception to the hearsay rule has completely eliminated the right of confrontation. The Sixth Amendments guarantee, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him"[1], was completely eviscerated by the trial courts decision that the child's accusations of rape could come in through other individuals. The admitted statements were neither admitted under a firmly rooted hearsay exception or established by a showing of particularized guarantee of trustworthiness. In short, Petitioner Stuart was convicted based upon nothing more than the untested and unchallenged statements of the child.

In *Idaho v. Wright*, 497 U.S. 805 (1990) this Court noted that "...the Confrontation Clause 'operates in two separate ways to restrict the range of admissible hearsay.' First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case..., the prosecution must either produce or demonstrate the unavailability of, the

[1] *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965); *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Wright*, at 814-815. (citations omitted)

In *Wright,* the youngest daughter, who was three (3) years old at the time of trial, was found "not capable of communicating to the jury." *Wright* at 809. The issue before the trial court then centered around the admission of certain statements made by the younger daughter to a pediatrician in response to questions he asked regarding the alleged abuse. The trial court admitted, pursuant to an exception to the hearsay rule, the child's statement to the

pediatricians concerning the sexual abuse. The Court found that this violated the defendant's Confrontation Clause rights.

In reaching its decision, this court examined whether the state had carried its burden of proving that the minor witnesses incriminating statement had sufficient indicia of reliability to withstand scrutiny under the confrontation clause. In answering this question, the court declined to set a preconceived and artificial litmus test. *Id.* at 819. Instead the court noted that "[w]e agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think that the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* The court went on to note that "[i]n other words, if the declarant's truthfulness is so clear from the surrounding circumstances

that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." *Id.* at 820. The court further clarified this by noting that "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made, and do not include those that may be added by using hindsight." *Id.* (citation omitted). Nor does the use of corroborating evidence tend to establish a particularized guarantee of trustworthiness. The reason for this is that "... hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

The Sixth Circuit Court of Appeals found that D.S.'s statements were inadmissible in that they did not fall within a firmly rooted hearsay exception. *Stuart v. Wilson*,

442 F.3d 506, 520 (C.A. 6th, 2006). The appellate court than reviewed the statements of D.S. in this case, and listed five (5) factors as to whether there was a showing of particularized guarantee of trustworthiness, as follows: (1) spontaneity; (2) consistent repetition; (3) the mental state of the declarant; (4) the use of terminology unexpected of a child of similar age; and (5) the lack of motive to fabricate. *Id.* (quoting *Idaho v. Wright*, 497 U.S 805, 881-882 (1990) In applying these five factors to the case *sub judice*, the appellate court below determined that there was a particularized guarantee of trustworthiness in D.S.'s statements.

However, this Court never intended that these five factors were to act as an exclusive list of considerations for appellate court to consider, noting that "[w]e therefore decline to endorse a mechanical test for determining 'particularized guarantee of trustworthiness' under the

Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Wright* at 822. In applying a straight analysis based solely upon the five factors listed above, which were the same factors relied upon by the state appellate court, the Sixth Circuit deferred to the lower court's determination regarding whether a hearsay statement has particularized guarantee of trustworthiness. *Lilly v. Virginia*, 527 U.S. 116 (1999). A review of the circumstances surrounding when D.S. made the statements establishes that there was not a particularized guarantee of trustworthiness.

The very first incident of any statement by D.S. was to Susan Burgess, who is D.S.'s aunt. In 1996, Ms. Burgess saw D.S. with his hand down inside of his diaper. She told him to quit that and D.S. indicated that Uncle Troy does this. When this occurred, both Petitioner Stuart as

well as Lorin Stuart, D.S.'s father, were present. D.S.'s father replied "[t]ell Aunt Susie that's what makes it grow." This incident was never mentioned again until October 5, 1999.

Based upon the conversation with Ms. Burgess on October 5, 1999, Lorin Stuart than talked to his son about what D.S. had said to her. However, based upon Ms. Burgess's testimony, Lorin Stuart was present when the statement was made. He had further responded with a sexually graphic statement in front of a child. Lorin Stuart therefore had no reason to suspect sexual abuse, but would have been aware of the fact that he had been inappropriate in front of his son. Further, given the inappropriate sexual statement made by Lorin in the presence of his sister and brother, one can only wonder what comments he made to D.S. when no one else was around. Further, when Lorin questioned D.S. about sexual misconduct, he "...went kind

of crazy" and that this was in front of D.S. who would have seen his reaction.

Lisa Stuart, the victim's mother, questioned D.S. on October 5, 1999, right after her husband Lorin had just questioned D.S. At the time that she questioned him, D.S. stated that the abuse did happen, and that he told her that he was sorry. However, it is important to remember that this is right after D.S. had just seen his father "go crazy", leaving him with the impression that if he changed his story, even if the changing the story was the truth, could cause his father to go crazy again, possibly resulting in punishment to him.

Cindy Hailey, while she was babysitting D.S. on March 18, 1998, claimed to have seen him playing with himself. When she questioned D.S. about this he stated that Uncle Troy does it. She further testified that D.S. told her that Petitioner Stuart kissed his pee-pee and played

with his butt hole. However, this is the only time that it was ever mentioned that Petitioner Stuart had allegedly touched D.S.'s bottom. Further, from March, 1998, until October 6, 1999, Cindy did not tell anyone about this incident except for her mother Susan.

Terra Johnstonbaugh, the investigating detective in this case, met with D.S. on October 5, 1999, at which time she interviewed him. This interview took place after both of D.S.'s parents had questioned him. When the detective first interviewed D.S. he did not indicate that any oral sex had taken place. It was not until the interview was over and Detective Johnstonbaugh talked to the parents that she became aware of it and proceeded to return to the interview room to discuss this with D.S. This interview not recorded by either video or audio recording.

Finally, it is important to remember in this case that in June of 1998, a CSB worker went to the Stuart's house

to talk to D.S. and his brother about an allegation of abuse by Petitioner Stuart. This date would have been after what both Ms. Burgess and Ms. Hailey claimed to have witnessed. However, both boys, including D.S. denied that there had been any abuse by Petitioner.

The Sixth Circuit's review of the hearsay statements in this case fails to comport with this Court's requirement that appellate courts are to review factors in relation to whether the child declarant was particularly likely to be telling the truth when the statement was made by limiting its review to the five factors set forth in *Wright*.

The inappropriate language of D.S.'s father in 1996, the fact that this incident was not an allegation of any sexual misconduct, that this incident was not mentioned again until 1999; that at the time D.S.'s father questioned him he went crazy in front of his son, that immediately after that D.S.'s mother questioned him and that right after

that a detective questioned him, who had to talk to D.S. twice to get him to give a statement consistent with what the parents knew, that D.S. never mentioned that Petitioner Stuart had touched his bottom again after stating it to Ms. Hailey and finally, that in 1998, which would have been after alleged abuse was to have occurred, D.S. told a CSB social worker that Petitioner Stuart had never touched him.

The appellate courts finding of particularized guarantee of trustworthiness is not supported by the record in this case. Rather, the court has limited its review to the five factors of *Wright*, which limits the review to the statements themselves, rather than determining whether the child declarant was particularly likely to be telling the truth when the statement was made.

CONCLUSION

For the foregoing reasons Petitioner Stuart requests that his petition for Writ of Certiorari be granted.

Respectfully Submitted,

NATHAN A. RAY #0041570
137 South Main Street, Suite 201
Akron, Ohio 44308
(330) 253-7171
burdon-merlitti@neo.rr.com

Attorney for Petitioner Stuart

APPENDIX

6TH CIRCUIT FILINGS:

Opinion,
filed 03/27/06 ..... A1-A41

NORTHERN DISTRICT OF OHIO FILING:

Memorandum Opinion and Order,
filed 12/14/04 ..... B1-B9

Judgment,
filed 12/14/04 ..... C1-C1

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0110p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TROY R. STUART,
Petitioner-Appellant,

No. 05-3092

v.

JULIUS WILSON, Warden,
Respondent-Appellee.

FILED
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Appeal from the United States District Court for the
Northern District of Ohio at Akron.
No. 03-00469-John R. Adams, District Judge.
Argued: February 1,2006
Decided and Filed: March 27,2006
Before: RYAN, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Nathan A. Ray, Akron, Ohio, for Appellant. Erik J. Clark, OHIO ATTORNEY GENERAL OFFICE, Columbus, Ohio, for Appellee.

ON BRIEF: Nathan A. Ray, Akron, Ohio, for Appellant. Gregory T. Hartke, OHIO ATTORNEY GENERAL OFFICE, CORRECTIONS LITIGATION SECTION, Cleveland, Ohio, for Appellee.

OPINION

CLAY, Circuit Judge. Petitioner Troy Stuart appeals the December 13, 2004 order of the United States District Court for the Northern District of Ohio granting the motion of Respondent Julius Wilson, Warden, to dismiss Petitioner's habeas application filed pursuant to 28 U. S. C. § 2254. Petitioner is currently incarcerated in Ohio state prison, having been convicted and sentenced for the state crimes of rape of a victim under the age of thirteen and gross sexual imposition of a victim under the age of thirteen. For the following reasons, we AFFIRM the order of the district court.

I. BACKGROUND

A. STATE PROCEEDINGS

On October 14, 1999, an Ohio state grand jury indicted Petitioner for two counts of rape by force of a victim under the age of thirteen and one count of gross sexual imposition of a victim under the age of thirteen. The alleged child victim in this case was Petitioner's nephew ("D.S."), the son of Petitioner's older brother.

On February 4, 2000, the prosecution notified the court of its intention to admit into evidence D.S.'s out-of-court statements to his mother ("Lisa"), father ("Lorin"), aunt ("Aunt Sue"), cousin ("Cousin Cindy"), and

the investigating detective pursuant to Ohio Evidence Rule 807. Under the state rule, the hearsay statement of an alleged victim of a sexual crime under the age of twelve is admissible if: (1) the state court finds particularized guarantees of trustworthiness of the hearsay statement; (2) the victim's testimony is not reasonably obtainable by the party seeking to admit the hearsay statement; (3) there is independent proof of the sexual act; and (4) at least ten days before the trial or hearing, the party seeking to admit the hearsay statement notifies the other parties of the content of the statement, when and where the statement was made, the identity of the witness to testify as to the statement, and the circumstances surrounding the statement that demonstrate particularized guarantees of trustworthiness. Ohio Evid. R. 807(A). The party seeking to admit the hearsay statement may satisfy requirement (2) if "[t]he child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify." Ohio Evid. R. 807(B)(1).

On February 17, 2000, the state trial court conducted an evidentiary hearing in order to determine whether the prosecution met the requirements of Rule 807. D.S. was examined for competency. He testified that he was five years old, and he testified that he knew the difference between telling the truth and telling a lie. He promised that he would

tell the truth during the hearing. On cross-examination, D.S. admitted that he sometimes lied to his parents. When asked if he lied to his Uncle Troy, Petitioner in this case, D.S. said yes, but he did not want to talk about it. He testified that no one had told him what to say and that he was going to tell the truth. The state trial court found that D.S. was competent to testify.

The investigating detective on the case then testified at the hearing. She testified that on October 5, 1999, D.S., his mother, and his father went to the police station to report a crime. The detective was made aware of some of the factual circumstances surrounding the case, and she then interviewed D.S. in the presence of his mother. After some small talk with D.S., the detective asked if he knew the difference between a good touch and a bad touch. He stated that he did know the difference; he identified his mother's kiss and his father's hug as good touches, and he identified being spanked as a bad touch. The detective then asked if being touched on his "pee-pee" was a good touch or bad touch, and D.S. responded that it was a bad touch. The detective asked if anyone had touched his penis, and D.S. responded that Petitioner had done so. The detective then asked if Petitioner had touched D.S.'s penis, and D.S. said yes. The detective then asked if D.S. had touched Petitioner's penis, and D.S. said yes. The detective asked where this conduct had occurred, and D.S. answered that it had taken place in his parents' bed or D.S.'s bed. When asked how many times this conduct had occurred,

D.S. stated that it had occurred many times. The detective then ended the conversation with D.S. and spoke to his parents. The parents informed the detective that D.S. had previously told them that D.S. and Petitioner had engaged in oral sex. After a few minutes, the detective re-interviewed D.S. and asked if there was anything D.S. did not tell the detective. D.S. answered, "Yes, yeah, Uncle Troy made me suck his pee-pee." (JA. at 120.) He also stated that Petitioner performed oral sex on D.S. D.S. stated that the oral sex had occurred on many occasions. On cross-examination, the detective testified that she had not tape-recorded her interview of D.S., but she did take notes.

D.S.'s father, Lorin, also testified at the hearing. Lorin testified that he and his family moved back to his father's (D.S.'s grandfather and Petitioner's father) house in September or October of 1998. Petitioner also lived at the house. When D.S.'s father and mother were at work, Petitioner would often babysit the family's children. On October 5,1999, Lorin spoke with Aunt Sue (Lorin's sister) at Aunt Sue's house, and Aunt Sue stated that in 1997 she had observed D.S. "playing with himself." (JA. at 174.) She asked D.S. why he was doing that, and he responded, "[B]ecause Uncle Troy does (JA. at 174.) Aunt Sue told Lorin that she did not know if Petitioner was "fooling around" with D.S., but that Lorin should find out. (JA. at 174.) After this conversation, Lorin returned to his father's house, where D.S. was at the time. Lorin asked D.S. if there was anyone who

was touching him in the wrong places, and D.S. answered, "Yes, Uncle Troy." (JA. at 141.) Lorin asked what Petitioner did to D.S., and D.S. responded that Petitioner made D.S. perform oral sex on Petitioner, and that Petitioner would perform oral sex on D.S. Lorin testified that after October 5, 1999, he did not ask D.S. questions about what had occurred between D.S. and Petitioner, but D.S. twice raised the subject, stating that Petitioner would get into bed with D.S. and engage in the sexual abuse.

D.S.'s mother, Lisa, also testified at the hearing. Lisa testified that on October 5,1999, Lorin recounted to Lisa the conversation that he had with D.S. about Petitioner and the sexual conduct between D.S. and Petitioner. She spoke with D.S. about the matter, and D.S. stated that the abuse had in fact happened, and that he was sorry for it. It is unclear from Lisa's testimony whether she used leading questions or the nature of the conversation. Lisa testified that she did not remember the exact conversation. She also stated that after that day, D.S. would "just come[ ] up" and talk about what had occurred between Petitioner and D.S., stating that Petitioner should not have "done that" and asking "why daddy didn't stop it." (JA. at 186.) D.S. also stated that the abuse would occur when his older brother was at school. Lisa testified that she did not ask D.S. questions, but rather D.S. would just come up and talk about what had occurred. On cross-examination, Lisa admitted that in June 1998, the children's services board ("CSB") had received information

that Petitioner had abused D.S. A CSB worker went to the family's home and interviewed both D.S. and his older brother. Both boys denied any abuse. Lisa did not know who had made the allegations of abuse, but she suspected that Aunt Sue or Cousin Cindy had done so as retribution for an altercation between Cousin Cindy, her brother, and Petitioner that had taken place earlier. Lisa admitted that Aunt Sue and Cousin Cindy did not say anything to her about Petitioner's abuse of D.S., and that her only basis of knowledge of the abuse was her conversation with D.S.

D.S. then testified. Petitioner's counsel objected to the presence of Lorin and Lisa, so the court ordered the parents to leave the courtroom. Both the prosecution and Petitioner's counsel asked D.S. if he would talk about what had happened between D.S. and Petitioner, and D.S. refused to answer. D.S. did testify that he did not lie to his father or to the investigating detective. D.S. also testified that no one had told him to refuse to answer questions about Petitioner.

D.S.'s aunt, Aunt Sue, then testified. She stated that in 1996,[1] she observed D.S. with his hands in his pants. She said to D.S., "Hey, boy, quit that," and D.S. responded, "Uncle Troy does that." (JA. at 228.) Both Lorin and Petitioner were

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[1]There seems to be confusion between Lorin and Aunt Sue as to when the event occurred, as Lorin testified that the event occurred in 1997.

present during this occasion. She also testified that she recounted this event to Lorin on October 5, 1999. She also testified that her daughter, Cousin Cindy, had made accusations against Petitioner in March 1997 or 1998.

D.S.'s cousin, Cousin Cindy, also testified at the hearing. She stated that on March 18,1997, her birthday, she saw D.S. playing with his penis. She asked what he was doing, and she said that he should not be doing that. D.S. replied that Uncle Troy does. Cousin Cindy then asked D.S. what else Petitioner did. He replied that "Troy kissed his pee-pee and played with his butt hole." (JA. at 241.) She testified that she told her mother what D.S. had said that day. About one year later, she told Petitioner that he would pay for what he had done to D.S. She testified that on October 6,1999, she told Lorin what D.S. had said to her on March 18, 1997. On cross-examination, Cousin Cindy admitted that D.S. could have meant that Petitioner played with his own penis and anus. She also testified that there was some question about whether Petitioner had previously stolen marijuana from her.

Shelly Kekic, a social worker with CSB, also testified at the hearing. She testified that in June 1998, she went to the family's home in response to an allegation that Petitioner was sexually abusing D.S. She interviewed Lisa, Petitioner, Petitioner's father, D.S. and D.S.'s older brother. D.S. denied that he was touched inappropriately by anyone. Petitioner denied sexually abusing D.S.

On March 21, 2000, the state trial court ruled that the hearsay statements were admissible under Ohio Evidence Rule 807. The state trial court found that while D.S. was competent to testify, he was not available to testify at trial:

> It ultimately became clear that [D.S.] was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Uncle Troy. It was clear that [D.S.], although physically present and competent, was in fact unavailable to testify relative to any substantive matters and issues before the Court in this case. There is no reasonable basis for this Court to believe or assume that availability in this area will improve or change. Thus, [D.S.] is found to be not reasonably available to testify in this case.

(J.A. at 305.) The state trial court then addressed the issue of indicia of trustworthiness. The court found that D.S.'s statements to Aunt Sue and Cousin Cindy, where both asked D.S. what he was doing when he was playing with his penis, "were spontaneous, clearly not orchestrated or directed." (J.A. at 306.) The court also found that D.S.'s response to Lorin's question of whether anyone had touched him in the wrong places was also spontaneous and very specific in light of his father's general question. The court also found that D.S.'s response to Lisa's questioning was "spontaneous and responsive, consistent with statements to three others." (J.A.

at 306.) Likewise, the court found that D.S.'s response to the investigating detective was consistent. In sum, the court found D.S.'s statements to bear particularized guarantees of trustworthiness:

> In this case, considering the totality of the circumstances, the Court find [sic] particularized guarantee [sic] that [D.S.'s] statements are trustworthy. These indicia include the spontaneity of the statements to aunts [sic, should be aunt and cousin] and parents, the internal consistency as to all, the mental state of the child, [D.S.'s] lack of motive to fabricate, his use of terminology unexpected of a child of similar age, the means by which the statements were elicited, as well as the amount of time between acts and statements and circumstances of this case. In summary, [D.S.'s] statements consistently referred only to Uncle Troy and what he did. The terminology of "kiss his pee-pee" would not normally be expected of a four/five year old. The fact of the babysitting arrangement offered ample opportunity over a specific period of time. The unprovoked or directed statements to the aunts [sic] had a particularly high degree of spontaneity and consistency.

(J.A. at 306-07.)

The court also found independent proof of sexual acts. The court referred to a letter that Lorin and his father found in

Petitioner's bedroom.[2] The court ultimately concluded that the hearsay evidence was admissible under Ohio Evidence Rule 807.

On March 31,2000, the jury found Petitioner guilty on all three counts. The state trial court sentenced Petitioner to two life sentence for the rapes and one year imprisonment for the gross sexual imposition, with the sentences to run concurrently. Petitioner appealed his conviction and sentence.

The state court of appeals affirmed. Petitioner made two claims before the state court of appeals that are relevant to the instant case before this Court. In his Third Assignment of Error, Petitioner claimed that the admission of the hearsay statements was improper under Ohio Evidence Rule 807, and he claimed that the admission of the hearsay statements also violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. In his Seventh Assignment of Error, Petitioner claimed that the state trial court committed error when it denied his request to call D.S. as a witness, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

The state court of appeals found that the trial court conducted the proper analysis as to the admissibility of the hearsay statements under Ohio Evidence Rule 807. As to the

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[2]We will not delve into the details of this issue, as it is not before this Court.

particularized guarantees of trustworthiness, the court found that the parents had enjoyed a good relationship with Petitioner before the discovery of the abuse, so there was no motive to lie. In addition, the explicit nature of the child's statements also indicated trustworthiness. Finally, the court also agreed with the state trial court that the statements were spontaneous. As to unavailability, the court found that an uncooperative child could be determined to be unavailable under Rule 807. The court also found that the prosecution had met the remaining two requirements, independent evidence of the sexual act and proper notice of the intent to use the hearsay statements.

The court also found that under Rule 807, if the child victim was uncooperative and thus found unavailable, the defendant did not have the right to call the child victim to testify as a witness. The court held that Petitioner's right to confrontation under the Sixth Amendment of the Constitution had not been violated by the admission of the hearsay statements under Rule 807, as the Ohio Supreme Court had already ruled that Rule 807 met the Confrontation Clause requirements in *State v. Storch*, 612 N.E.2d 305 (Ohio 1993).

Petitioner appealed the decision to the state supreme court. In his memorandum in support of the appeal, he argued, among other things, that the admission of the hearsay statements did not conform to Ohio Evidence Rule 807 and violated his due process rights and his right to confrontation under the United States Constitution. The Ohio Supreme

Court denied Petitioner leave to appeal. The United States Supreme Court denied Petitioner's petition for writ of certiorari.

B. FEDERAL PROCEEDINGS

On March 17, 2003, Petitioner filed a habeas petition pursuant to 28 U.S.C. § 2254 in federal district court. On August 28, 2003, Petitioner filed a motion to file a corrected memorandum in support of his petition, as the original memorandum was missing several pages. The district court granted the motion. In his corrected memorandum, Petitioner argued, among other things, that the admission of the hearsay statements was a violation of his due process rights and his right to confrontation under the United States Constitution. Petitioner made three arguments: (1) the declarant was not unavailable to testify at trial; (2) the hearsay statements did not have particularized guarantees of trustworthiness; and (3) there was no independent proof of the sexual act.[3]

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[3]We note that Petitioner's third claim, that there was no independent proof of the sexual act, was a claim that the state trial court violated Ohio Evidence Rule 807. Generally speaking, a claim that a state trial court violated state law is an insufficient basis for federal habeas relief: "Errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983) (citations omitted). Only errors of state law

On March 12, 2004, the magistrate judge recommended that the habeas petition be dismissed. As to the admission of the hearsay statements, the magistrate judge found that to the extent Petitioner challenged the admission on failure to conform to the requirements of Ohio Evidence Rule 807, Petitioner did not have a cognizable claim, as the challenge was one solely of state law.[4] *See* note 3, *supra*. The

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that result in a denial of fundamental fairness in violation of due process are cognizable in federal habeas corpus proceedings. *Id.* (citations omitted).

The question then becomes whether the state trial court's admission of the hearsay statements, in light of the alleged lack of independent proof of the sexual act, resulted in a due process violation. That question, however, is not before this Court; while Petitioner argued to the district court that there was no independent proof of the sexual act, he does not raise this argument in his brief to this Court.

[4]Specifically, Petitioner argued to the district court that the hearsay evidence was inadmissible under Ohio Evidence Rule 807 because D.S. was available to testify, D.S.'s hearsay statements did not have particularized guarantees of trustworthiness, and there was no independent proof of the sexual act. We note that while Ohio Evidence Rule 807 requires unavailability and particularized guarantees of trustworthiness, these same concepts are applicable to the federal Confrontation Clause analysis. *See infra*. In other words, while a state law violation is generally not cognizable at federal habeas, *see* note 3, *supra*, an action that is a state

magistrate judge found that Petitioner's argument that his rights under the United States Constitution were violated was made only in passing to the state appeals and state supreme court. The magistrate judge also found that the state appeals court and the state supreme court had made their decisions based solely on state law grounds. The magistrate judge therefore concluded that Petitioner had failed to fairly present this claim to the state courts. The magistrate judge also concluded that Petitioner had procedurally defaulted this claim in state court, as the time limitations for post-conviction petitions under state law had since expired. This also meant that Petitioner had technically exhausted his state court remedies. The magistrate judge found that Petitioner failed to show adequate cause and prejudice for the procedural default, and he failed to show a miscarriage of justice. The magistrate judge thus recommended that the district court reject this claim.

Petitioner appealed the magistrate judge's recommendation only with respect to the claim of improper admission of the hearsay statements. Petitioner argued that he properly presented to the state courts his claim under the Confrontation Clause of the United States Constitution.

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law violation may also be simultaneously a federal constitutional or statutory violation, which is cognizable on federal habeas.

Petitioner asserted that he specifically identified the source of federal law underlying his claim.

On December 13, 2004, the district court adopted the magistrate judge's recommendation, with modification, and dismissed Petitioner's habeas petition. The modification dealt with whether Petitioner fairly presented his right to confrontation claim to the state courts. The district court found that Petitioner had fairly presented this claim, so his claim was not barred by state law and he therefore did not need to show cause and prejudice for his failure to raise the claim in state court. The court cited to *Baldwin v. Reese*, where the Supreme Court explained:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

(J.A. at 1274 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).) In his appeals to both the state appeals court and the state supreme court, Petitioner stated that his claim as to the admission of the hearsay statements was based in part on the United States Constitution, so that he in fact fairly presented the claim to the state courts.

While Petitioner had presented his right to confrontation claim to the state courts, the district court held that the claim failed under the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U S.C. § 2254. Petitioner claimed that the admission of the hearsay statements was predicated on the state trial court's finding of the unavailability of the declarant, and that this finding was contrary to the clearly established Supreme Court precedents found in *Coy v. Iowa*, 487 US. 1012 (1986), and *Maryland v. Craig*, 497 US. 836 (1990). The district court rejected this argument, relying on the Supreme Court's holding in *White v. Illinois*, 502 US. 346 (1992), where the Supreme Court limited *Coy* and *Craig* to the issue of what requirements were necessary under the Confrontation Clause when a witness actually testified. The Supreme Court specifically refused to extend the holdings of *Coy* and *Craig* to the admission of hearsay statements. In Petitioner's case, D.S. did not actually testify, so *Coy* and *Craig* were inapposite. The district court did issue a certificate of appealability with respect to the claim of right to confrontation.

On December 13, 2004, Petitioner timely filed a notice of appeal.

II. DISCUSSION

A. THE STATE COURT'S DECISION TO ADMIT HEARSAY EVIDENCE WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW WHEN THE CHILD VICTIM DECLARANT WAS TECHNICALLY NOT UNAVAILABLE TO TESTIFY BUT WAS UNWILLING TO TESTIFY

1. Preservation of the Issue

We agree with the district court's holding that Petitioner fairly presented his right to confrontation claim to the state courts.

2. Standard of Review

When reviewing a district court's habeas decision, this Court reviews the legal conclusions *de novo* and the factual findings for clear error. *Jones v. Jamrog*, 414 F.3d 585, 590 (6th Cir. 2005). Because Petitioner filed his habeas petition after the effective date of AEDPA, AEDPA applies. *Lindh v. Murphy*, 521 US. 320, 336 (1997). Under the strictures of that statute, the federal courts may not grant habeas relief for a state prisoner unless the state court adjudication of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Petitioner argues that AEDPA is inapplicable in this case and that he is entitled to *de novo* review because the state courts did not fully address the

merits of his right to confrontation claim. We disagree. The state court of appeals specifically held that the admission of the hearsay statements under Ohio Evidence Rule 807 did not violate the Confrontation Clause, as the Ohio Supreme Court had already held that Rule 807 comported with the Confrontation Clause in *State v. Storch*, 612 N.E.2d 305. The state court therefore fully addressed Petitioner's right to confrontation claim and AEDPA applies.

Petitioner does not claim that the state court unreasonably applied clearly established federal law; he argues only that the state court decision was contrary to clearly established federal law. A state court decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 US. 362, 413 (2000). "A legal doctrine is not 'clearly established Federal law, as determined by the Supreme Court' unless it is based on 'holdings, as opposed to the dicta, of the Court's decisions as of the time of the relevant state-court decision.'" *Jamrog*, 414 F.3d at 591 (quoting *Williams*, 529 US. at 412).

3. Analysis

No clearly established federal law requires that, in order to satisfy the Confrontation Clause, a declarant must be unavailable before the hearsay statements of an alleged child victim may be admitted under a non-firmly rooted hearsay

exception.[5] Thus, Petitioner may not attack the state court

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[5]Firmly rooted hearsay exceptions are those that "rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of constitutional protection." *Ohio v. Roberts*, 448 US. 56, 66 (1980) (internal quotation marks and citation omitted). "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright*, 497 US. 805, 817 (1990). "This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over time to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at a trial." *Lilly v. Virginia*, 527 US. 116, 126 (1999) (internal quotation marks and citation omitted). Examples of firmly rooted hearsay exceptions are (1) spontaneous declarations, *White v. Illinois*, 502 U S. 346, 357 (1992); (2) statements made for medical treatment, *id.*; (3) co-conspirator statements, *Bourjaily v. United States*, 483 US. 171, 183 (1987); (4) voluntary admissions used against the declarant, *Lilly*, 527 US. at 127.

All other hearsay exceptions that do not have this longstanding recognition of reliability are non-firmly rooted hearsay exceptions. Neither party argues that Ohio Evidence Rule 807 is a firmly rooted hearsay exception, and with good reason: the state adopted the rule in 1991. Moreover, the rule is not analogous to any of the firmly rooted hearsay exceptions. Thus, Ohio Evidence Rule 807 is a non-firmly rooted hearsay exception.

decision based on the availability of D.S. to testify.

a. Legal Framework

The Sixth Amendment, in part, states: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. While the Confrontation Clause could be interpreted literally to preclude all hearsay statements, Supreme Court precedent demonstrates that this is not the case.

In Ohio v. Roberts,[6] the defendant was arrested for forgery of a check in the name of Bernard Isaacs, and for possession of stolen credit cards in the names of Bernard and his wife Amy. 448 U. S. at 58. The defendant contended that the Isaacs' daughter, Anita, with whom he was acquainted, gave him her parents' checkbook and credit cards so that he could use them. *Id.* at 59. At a preliminary hearing, before the defendant was even indicted, defense counsel called Anita as a witness. *Id.* at 58. Anita testified that she knew the defendant, and that she had permitted him to stay at her

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[6]While *Ohio v. Roberts* has been partially overruled by *Crawford v. Washington*, 541 US. 36 (2004), it is still relevant law in the instant case, as Petitioner's sentence became final before *Crawford*, and Petitioner does not argue that *Crawford* applies retroactively.

apartment for several days. *Id.* She denied, however, giving the defendant her parents' checkbook and credit cards so that he could use them. *Id.*

A state grand jury indicted the defendant for forgery, receiving stolen property, and heroin possession. *Id.* In preparation for trial, the prosecution issued five subpoenas for Anita at her parents' residence. *Id.* at 59. She did not respond to these subpoenas and she did not appear at trial. *Id.* At trial, the defendant testified that Anita had given him the checkbook and the credit cards so that he could use them. *Id.* The state then offered Anita's previous testimony in rebuttal. *Id.* Relying on the Confrontation Clause, the defense objected, and the state trial court conducted a *voir dire* hearing. *Id.* Anita's mother, Amy, testified that Anita had gone to Tucson, Arizona shortly after the preliminary hearing. *Id.* at 59-60. She testified that no one knew where Anita was. *Id.* at 60. The state trial court admitted the hearsay statements of Anita, and the defendant was convicted on all counts. *Id.*

The Supreme Court held that the admission of the hearsay evidence was not error. The Court first addressed the requirements that the Confrontation Clause placed on hearsay statements:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including

> cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. ...
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule.

Id. at 65 (internal quotation marks and citations omitted). With respect to unavailability, the Court noted that "[a] demonstration of unavailability is not always required. In *Dutton v. Evans* 400 U.S. 74 ... (1970), for example, the Court found that the utility of trial confrontation was so remote that it did not require the prosecution to produce a seemingly available witness." *Id.* at 65 n.7. With respect to trustworthiness, the Court stated, "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. The Court found that the circumstances surrounding Anita's testimony at the preliminary hearing indicated trustworthiness, and that Anita

was unavailable, so that the admission of the hearsay statements did not violate the Confrontation Clause. *Id.* at 73, 77.

In *United States v. Inadi*, 475 U.S. 387 (1986), the Supreme Court abrogated the unavailability requirement of Roberts. There, the defendant was indicted for conspiracy to manufacture and distribute methamphetamines. *Id.* at 388-89. At trial, the prosecution sought to introduce evidence of taped conversations of the other co-conspirators, who were not indicted. *Id.* at 390. The district court found that the hearsay statements of the co-conspirators were admissible under Federal Rule of Evidence 801, as they were statements made during the course and in the furtherance of the conspiracy. *Id.* The defendant objected on Confrontation Clause grounds, claiming "that the statements were inadmissible absent a showing that the declarants were unavailable." *Id.* The prosecution subpoenaed one of the co-conspirators ("Lazaro"), but he failed to appear. *Id.* Nonetheless, the district court admitted the statements based on Federal Rule of Evidence 801. *Id.* at 391.

The Supreme Court held that the evidence was properly admitted, despite the prosecution's failure to prove that Lazaro was unavailable. The Court explained that while language in Roberts could be read to support the proposition that a party must prove a declarant's unavailability as a prerequisite for the admission of any hearsay statement,

> *Roberts* should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining: the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.
>
> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that Roberts simply reaffirmed a longstanding rule ... that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. at 392-94 (internal quotation marks and citation omitted).

The Court found that the unavailability rule, while logical in the context of prior testimony, was inapplicable to the hearsay statement of a co-conspirator. With respect to prior testimony, the Court stated that prior testimony was often merely a weaker substitute for live testimony at trial. *Id.* at 394. "When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the

better evidence." *Id.* The hearsay statements of a co-conspirator, however, could not be adequately replaced by live testimony:

> Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court .... Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.
>
> [C]o-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, only clear folly would dictate an across-the-board policy of doing without such statements.

Id. at 395-96 (internal quotation marks and citation omitted).

The Court continued and explained why a universal unavailability rule would have little benefit. First, the rule would not be a "better evidence" rule, as it would exclude evidence only when the prosecution failed to produce an available declarant. *Id.* at 396. Second, key witnesses at a trial would have already been subpoenaed, thus causing the rule to be relevant only to witnesses with marginal

information. *Id.* at 397. The Court then found that the burdens placed on the prosecution by such a rule would be great, as the prosecution would be responsible for keeping abreast of all of the movements of the declarants. *Id.* at 399. The Court concluded that the unavailability rule was inapplicable to co-conspirator hearsay statements. *Id.* at 400.

In *Idaho v. Wright*, 497 U.S. 805, the Supreme Court addressed Confrontation Clause requirements in the context of the hearsay statements of an alleged child victim of sexual abuse. The defendant was the mother of the two alleged victims of abuse, who were two and one-half years old ("younger daughter") and five and one-half years old ("older daughter") at the time the defendant was charged. *Id.* at 809. The allegations were that the defendant had held down her daughters while her boyfriend raped them. After allegations of abuse had surfaced, a doctor examined the younger daughter. *Id.* The doctor found strong evidence of sexual abuse of the younger daughter. *Id.* The case revolved around certain statements elicited by the doctor from the younger daughter.[7] *Id.* at 810-11. Over the objection of the defendant, the doctor testified as to the hearsay statements of the younger daughter, as the state trial court found that they fell within the

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[7]The content of these statements will be discussed, *infra*, when we address the issue of particularized guarantees of trustworthiness.

residual hearsay exception of the state. *Id.* at 811-12. The state trial court found that the younger daughter was incapable of communicating to the jury. *Id.* at 809.

The Supreme Court made no finding as to whether the unavailability rule would apply to the younger daughter's hearsay statements:

> Applying the *Roberts* approach to this case, we first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial-and, if so, what that showing requires. The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed .... For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.

Id. at 815-16. The Supreme Court thus did not address whether the unavailability rule applied to an alleged child victim's hearsay statements when those statements were admitted under a non-firmly rooted hearsay exception.

In *White v. Illinois*, 502 U. S. 346, the Supreme Court again addressed hearsay statements and the Confrontation Clause in the context of an alleged child victim of sexual

abuse. There the evidence showed that in the early morning hours of April 16, 1988, the defendant sexually attacked S.G., a four-year old girl, in S.G.'s home. *Id.* at 349. S.G.'s babysitter heard S.G.'s screams and went to her room, where he saw the defendant leave the room. *Id.* The babysitter knew the defendant because the defendant was a friend of S.G.'s mother. *Id.* The babysitter asked S.G. what had happened, and S.G. stated that the defendant had choked her, threatened her, and had touched her inappropriately. *Id.* S.G.'s mother came home soon thereafter and asked S.G. what had happened. S.G. repeated what she had told the babysitter earlier. *Id.* The mother called the police, and a police officer questioned S.G. *Id.* at 349-50. S.G. repeated the same story she had told the babysitter and her mother. *Id.* at 350. S.G. was then taken to the hospital, where she was examined by a nurse and then a doctor. *Id.* S.G. told the nurse and the doctor the same story she had told to the other individuals. *Id.*

At trial, S.G. did not testify. The prosecution twice attempted to call her as a witness, but she "experienced emotional difficulty" and did not testify. *Id.* Over the defendant's objection, the state trial court admitted S.G.'s hearsay statements to the babysitter, the mother, and the police officer under the spontaneous declaration exception. *Id.* Over the defendant's objection, the state trial court admitted S.G.'s hearsay statements to the nurse and the doctor under both the spontaneous declaration exception and the exception

for statements made in the course of medical treatment. *Id.* at 350-51.

The Supreme Court affirmed the admission of all of the statements. The defendant, relying on *Roberts*, argued that the Confrontation Clause required that the declarant be unavailable before the hearsay statements could be admitted. *Id.* at 353. Echoing its analysis in *Inadi*, the Supreme Court found, "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *Id.* at 354 (citation omitted). The Supreme Court found that the circumstances that support the trustworthiness of a spontaneous declaration or a statement in the course of medical treatment "cannot be recaptured even by later in-court testimony." *Id.* at 355-56. Live testimony could not replicate the excitement that causes a spontaneous declaration, nor could it replicate a medical setting, where a false statement could cause misdiagnosis or mistreatment. *Id.* at 356.

The Supreme Court concluded that when a hearsay statement "has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *Id.* at 356. The Supreme Court rejected the defendant's reliance on *Coy v. Iowa*, 487 US. 1012 (1988), and *Maryland v. Craig*, 497 US. 836 (1990). The Supreme Court explained that those cases

involved in-court procedures where the alleged child victim actually testified at trial; in *Coy*, the witness testified behind a screen, and in *Craig*, the witness testified via closed circuit television. *Id.* at 357. In those two cases, the Supreme Court required the prosecution to prove the necessity of the procedure to "avert a risk of harm to the child." *Id.* The defendant argued that the hearsay statements of an alleged child victim should be admitted only when the prosecution makes a showing of necessity, *i.e.*, testifying would create a risk of harm to the witness. *Id.* The Supreme Court disagreed, finding *Coy* and *Craig* inapplicable to out-of-court statements. *Id.* at 358.

b. Application to This Case

There is no clearly established federal law that requires an alleged child victim to be unavailable before his hearsay statements may be admitted under a hearsay exception that is not firmly rooted. Petitioner relies primarily on *Roberts* , claiming that the Confrontation Clause requires a declarant to be unavailable before the admission of the declarant's hearsay statements. Petitioner fails to recognize that the Supreme Court has twice limited the unavailability rule in *Roberts*, in both *Inadi* and *White*, to hearsay statements made in a prior judicial proceeding. Of most significance, the Supreme Court proclaimed in *White* that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior

judicial proceeding." 502 U.S. at 354 (citation omitted) (emphasis supplied). We acknowledge that in *Wright*, the Supreme Court seemed to use *Roberts* as a general framework in discussing hearsay statements under the Confrontation Clause; however, the Supreme Court followed *Wright* with the previously-cited language in *White*, which clearly limited the *Roberts* unavailability analysis to hearsay statements made in a prior judicial proceeding. To the extent friction exists between *Wright, Inadi,* and *White*, such friction demonstrates that there is no clearly established federal law as to an unavailability rule for the hearsay statement of an alleged child victim under a hearsay exception that is not firmly rooted.

As explained above, Petitioner may rely only on the holdings of Supreme Court cases to demonstrate clearly established federal law. In our view, the Supreme Court held the following:

(1) In *Ohio v. Roberts*, the Supreme Court held that the admission of hearsay statements made in prior judicial proceedings was dependent upon the unavailability of the declarant.

(2) In *United States v. Inadi*, the Supreme Court held that the admission of a co-conspirator's hearsay statement was not dependent upon the unavailability of the declarant.

(3) In *Idaho v. Wright*, the Supreme Court made no holding as to whether the unavailability of the

declarant was a prerequisite to the admission of hearsay statements of an alleged child victim under a non-firmly rooted hearsay exception.

(4) In *White v. Illinois*, the Supreme Court held that the admission of hearsay statements of an alleged child victim under a firmly rooted hearsay exception was not dependent upon the unavailability of the declarant.

No Supreme Court holding clearly establishes the applicability of an unavailability rule in this case. This is not a situation where "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or [where] the state court decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. The Supreme Court has not reached a conclusion as to an unavailability rule for the admission of hearsay statements of an alleged child victim under a non-firmly rooted hearsay exception; in fact, the Supreme Court explicitly left this exact issue open in *Wright*. Moreover, *White* contained unambiguous direction from the Supreme Court to apply the unavailability analysis only with hearsay statements made in prior judicial proceedings. We therefore hold that the admission of D.S.'s hearsay statements, despite the fact that D.S. was technically not unavailable, was not contrary to clearly established federal law.

Our decision today is further grounded in a prior decision of this Court. In *Bugh v. Mitchell*, this Court found, on post-AEDPA habeas review, that the *Roberts* unavailability analysis was limited to hearsay statements made in prior judicial proceedings. 329 F.3d 496, 507 n.3 (6th Cir. 2003).

To the extent Petitioner relies on *Coy* and *Craig* for the proposition that the prosecution must establish necessity before substituting D.S.'s hearsay statements for D.S.'s testimony, we agree with the district court that the Supreme Court rejected this exact position in *White*.

B. THE STATE COURT'S DECISION TO ADMIT HEARSAY EVIDENCE WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW WHEN CONSIDERING THE PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS OF THE HEARSAY EVIDENCE

1. Preservation of the Issue

We agree with the district court's holding that Petitioner fairly presented his right to confrontation claim to the state courts.

2. Standard of Review

The appropriate standard of review is set out above.

3. Analysis

D.S.'s hearsay statements were characterized by particularized guarantees of trustworthiness, as defined by the Supreme Court. As a result, the admission of D.S.'s hearsay statements was not contrary to clearly established federal law.

a. Legal Framework

As explained above, in *Ohio v. Roberts*, the Supreme Court set out a two-step Confrontation Clause analysis for hearsay statements. The first step, the unavailability of the declarant, has been the subject of continued abrogation and qualification. *See supra*. The second step, the trustworthiness of the hearsay statements, has not been placed into doubt, outside of *Crawford*. In *Roberts*, the Court observed that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U. S. at 66.

In *Idaho v. Wright*, the Supreme Court explained what the particularized guarantees of trustworthiness encompassed in the context of an alleged child victim declarant. In that case, the alleged child victim was taken to a doctor. 497 U.S. at 809-10. Over the defendant's objection, the doctor testified at trial as to statements made by the alleged child victim. *Id.* at 810. The trial court admitted the hearsay statements under the residual hearsay exception. *Id.* at 811-12. The doctor testified that he asked the child the following questions: "Do

you play with your daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" *Id.* (quotation marks omitted). The doctor testified that the child said yes to the question, "Does daddy touch you with his pee-pee," and the child did not respond to the question, "Do you touch his pee-pee." *Id.* at 811. After this line of questioning, the child volunteered the statement that daddy engaged in such conduct with her older sister on a more frequent basis. *Id.*

The Supreme Court held that the hearsay statements were inadmissible. The Court reiterated the rule in *Roberts* that a hearsay statement must be trustworthy in order to satisfy the Confrontation Clause. *Id.* at 816. The hearsay statement must fall under a firmly rooted hearsay exception, or it must have particularized guarantees of trustworthiness. *Id.* (citation omitted). The Court stated that a hearsay statement that did not fall under a firmly rooted hearsay exception was presumptively unreliable. *Id.* at 818 (citation omitted). In the case of such a hearsay statement, the party seeking admission must prove particularized guarantees of trustworthiness. *Id.* at 819. The particularized guarantees of trustworthiness must be demonstrated through the totality of the circumstances. Moreover, the particularized guarantees of trustworthiness must derive from the surrounding circumstances of the hearsay statement. *Id.* at 819-20 ("[B]ut we think the relevant circumstances include only those that surround the making of the statement and that render the

declarant particularly worthy of belief."). Thus, evidence corroborating the hearsay statement may not be considered a particularized guarantee of trustworthiness: "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

For hearsay statements made by an alleged child victim of sexual abuse, the Supreme Court listed the following factors as particularized guarantees of trustworthiness: (1) spontaneity; (2) consistent repetition; (3) the mental state of the declarant; (4) the use of terminology unexpected of a child of similar age; and (5) the lack of a motive to fabricate.[8] *Id.* at 821-22.

Armed with these principles, the Supreme Court held that the hearsay statements of the child to the doctor were inadmissible. The statements were admitted under the residual hearsay exception, not a firmly rooted hearsay exception. *Id.* at 817. The Court found that the questions posed by the doctor were suggestive and leading, and the responses were thus unreliable. *Id.* at 826. As to the statement later volunteered by the child concerning her older sister, the Court found that while the spontaneity of the statement suggested

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[8]These factors are listed under Ohio Evidence Rule 807 and were considered by the state courts.

reliability, ultimately the spontaneity of the statement could have been influenced by the preceding suggestive questioning. *Id.* at 826-27.

b. Application to This Case

We begin with the presumption that D.S.'s hearsay statements are inadmissible, as they do not fall under a firmly rooted hearsay exception. With respect to spontaneity, we conclude that the state court's finding that all of the statements had a degree of spontaneity and were not the result of suggestion is not contrary to clearly established federal law. When both Aunt Sue and Cousin Cindy, on two separate occasions, questioned D.S. as to why he was playing with his penis, he responded that Petitioner did so. When Cindy asked what else Petitioner did, D.S. responded that Petitioner kissed his penis and played with his anus. Unlike the facts in *Wright*, the questions posed by Cousin Cindy were not leading or suggestive; in fact, Cousin Cindy testified that she was shocked at D.S.'s response. With respect to D.S.'s statements to Lorin, Lorin testified that, on October 5, 1999, after Aunt Sue had informed him of Petitioner's possible abuse of D.S., Lorin asked D.S. if anyone was touching him inappropriately. D.S. replied that Petitioner had been doing so. Lorin asked what exactly Petitioner did, and D.S. replied that Petitioner made D.S. perform oral sex on Petitioner, and that Petitioner would perform oral sex on D.S. In no way did Lorin imply, suggest, or otherwise lead D.S. to name Petitioner as the perpetrator, nor did he lead D.S. to specify the conduct

involved. Moreover, Lorin testified that after October 5, 1999, D.S. would make spontaneous statements about Petitioner's conduct. With respect to D.S.'s statements to Lisa, the record is unclear as to her conversation with D.S. on October 5, 1999, although Lisa testified that the conversation duplicated Lorin's conversation with D.S.; however, Petitioner points to no evidence that Lisa was suggestive or leading in that conversation. Lisa further testified that after October 5, 1999, D.S. would make spontaneous statements to her about Petitioner concerning the abuse. With respect to D.S.'s statements to the investigating detective, the detective testified that she asked D.S. if anyone had touched his penis, and D.S. replied that Petitioner had done so. The state court's finding that this question was not leading or suggestive is not contrary to clearly established federal law. The detective's question of whether D.S. touched Petitioner's penis, however, was leading in the same way the questions posed by the doctor in Wright were leading; the answer to the question was embedded in the question itself, so that D.S. only had to respond "yes." The detective's question of whether D.S. had failed to mention anything, to which D.S. explained that the sexual abuse involved oral sex, was not leading. While the detective already knew from Lorin and Lisa that the abuse did in fact involve oral sex, the detective did not suggest this answer in her question.

With respect to consistent repetition, the record shows that D.S. recounted the same facts concerning the abuse he

suffered at the hands of Petitioner. In 1997, D.S. told Cousin Cindy that Petitioner performed oral sex on D.S. On October 5, 1999, D.S. told essentially the same story to his father, his mother, and the investigating detective. In our view, the fact that D.S. told the same story more than two years after his statements to Cousin Cindy especially supports the reliability of D.S.'s statements.

With respect to the mental state of D.S., most of D.S.'s statements were not made under stress, excitement, or similar mental states that would lend reliability to those statements. The only possible situation where D.S.'s mental state may have been a factor was on October 5, 1999, when Lorin asked D.S. whether anyone had touched him inappropriately. D.S. appeared as if he was about to cry, and he answered that Petitioner had touched him. Lorin then asked what Petitioner did, and D.S. described the nature of the abuse. It appears that D.S. answered these questions in an emotional state, so as to decrease the likelihood of fabrication.

With respect to use of terminology unexpected of a child of similar age, D.S.'s description of the oral sex involved in the abuse is strong evidence as to the reliability of his statements. When D.S. was three years old, he told Cousin Cindy that Petitioner performed oral sex on D.S. and that Petitioner played with D.S.'s anus. When D.S. was five years old, D.S. told his father, mother, and the investigating detective that Petitioner made D.S. perform oral sex on Petitioner and that Petitioner performed oral sex on D.S. It is

extremely unlikely that a child so young even has an inkling as to the concept of oral sex, let alone knowledge sufficient to concoct a falsehood concerning oral sex.

With respect to the lack of a motive to fabricate the statements, there is nothing in the record that suggests any animosity or any other reason D.S. would fabricate the statements about Petitioner. Indeed, D.S. "indicated that he liked 'Uncle Troy' when he was not made to touch Troy or when Troy did not touch him." (J.A. at 1006.)

When viewed in the totality of the circumstances, the factors are sufficient to establish particularized guarantees of trustworthiness as to D.S.'s statements to overcome the presumption of the inadmissibility of those statements. The manner in which the statements were elicited, the consistency of the statements, the use of terminology unexpected of such a young child, and the lack of a motive to fabricate the statements all indicate that the statements were reliable. At most, D.S.'s response to the detective's question of whether D.S. touched Petitioner's penis was unreliable and inadmissible, as the question was leading; however, the improper admission of this statement was harmless, when considering the extent of the reliable statements properly admitted.

For the foregoing reasons, we **AFFIRM** the order of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
Dec. 14, 2004
Northern District of Ohio, Clerk

TROY R. STUART,	)	
Petitioner,	)	**Case No. 5:03CV469**
	)	
v.	)	**Judge John R. Adams**
	)	
JULIUS WILSON, warden	)	**MEMORANDUM**
Respondent.	)	**OPINION & ORDER**

On March 17, 2003, following his conviction and sentence, Petitioner Troy R. Stuart filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. On May 15, 2003, Respondent Julius Wilson, Warden (the "Warden") filed his Return of Writ. Magistrate Judge George J. Limbert issued his Report & Recommendation (Report) on March 12, 2004. In his Report, the Magistrate Judge recommended that Stuart's petition be denied. On March 31, 2004, after having been granted a ten (10) day extension of time, Petitioner filed his Objection, and the Warden filed his response shortly thereafter. This Court, after having reviewed Stuart's objection to the Report and the Warden's response, hereby adopts the Report, as modified, herein, and dismisses Stuart's petition.

I. Facts & Procedure

On March 31, 2000, a jury found Stuart guilty of two counts of rape by force of a victim under thirteen years of age, and one count of gross sexual imposition of a victim under thirteen years of age, in violation of the Ohio Revised Code.[1] He was later sentenced to life in prison for his crimes.

Stuart appealed his conviction to the Ohio Court of Appeals for the Ninth Judicial District and then to the Ohio Supreme Court. The state appellate court overruled each of Stuart's seven assignments of error and the state supreme court dismissed his appeal as not involving any substantial constitutional question. Stuart then filed a Petition for a Writ of Certiorari to the United States Supreme Court, which was subsequently denied.

On March 17, 2003, Stuart filed the instant petition for a writ of habeas corpus. His petition was later amended and set forth five grounds for relief.[2] In his second ground for relief,

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[1] A more comprehensive review of the procedural history of this case is set forth in the Magistrate Judge's Report. (ECF. 30).

[2] Stuart's five grounds for relief are set forth in the Report. They are not set forth herein because Stuart has only objected to the Magistrate Judge's recommendation on his second ground for relief.

Stuart argued that his conviction violated his constitutional rights to due process and confrontation because certain out-of-court statements allegedly made by the child victim were introduced at trial through the testimony of other witnesses. Namely, three relatives and a police detective.

On March 12, 2004, the Magistrate Judge issued his Report and recommended that the Court dismiss the petition in its entirety. The Magistrate Judge recommended that the Court overrule Stuart's second ground for relief because his challenge to the state court's application of state law is not cognizable in a federal habeas corpus proceeding and because he did not fairly present his federal claims to the state courts.

On March 31, 2003, after having been granted a ten-day extension of time, Stuart filed his Objection to the Magistrate Judge's Report. Stuart submitted an objection only to the Magistrate Judge's recommendation on his second ground for relief.

II. Law & Analysis

At the outset, the Court notes that under Federal Rule 72(b) and 28 U.S.C. § 636, this Court is required to review de novo the portion of the Magistrate Judge's Report to which a specific objection was made.[3]

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[3] A party who fails to file an objection waives the right to appeal. U.S. v. Walters. 638 F.2d 947, 950 (6th Cir. 1981).

In this case, Stuart argues in his objection that he did raise his federal constitutional arguments in the state courts, and that the Magistrate Judge erred in finding procedural default and in not reaching the merits of his claim. The Warden concedes this point based on recent United States Supreme Court precedent issued a mere ten days prior to the date the Magistrate Judge issued his Report, but argues that Stuart's claim still fails on its merits. This Court agrees with the Warden and finds that Stuart did fairly raise his federal constitutional arguments in the state courts based upon a fair reading of Baldwin v. Reese, 124 S.Ct. 1347, 1351 (2004), which determines what constitutes a "fair presentation."

In his brief to the state appellate court, Stuart presented seven assignments of error, two of which referred to the trial court's allowance of the child victim's out-of-court statements. In these assignments of error, Stuart stated that the hearsay testimony was in violation of his rights "as guaranteed to him by the fifth, sixth, and fourteenth amendments to the U.S. Constitution" and that his inability to call the child victim as a witness was in violation of these rights.

In his brief to the Supreme Court of Ohio, Stuart argued that the child victim's out-of-court statements, which were deemed admissible under Ohio's rules of evidence, were in violation of his constitutional right to due process and the right to confrontation as set forth in both the state and federal constitutions.

According to the United State Supreme Court's decision in Baldwin,

> [a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Id. Accordingly, Stuart need not show cause and prejudice and his second ground for relief can be determined on the merits.

In this ground for relief, Stuart argues that his conviction is violative of his constitutional right to due process and his right to confront witnesses because the trial court allowed an out-of- court statement allegedly made by the child victim to be introduced through the testimony of other witnesses. Specifically, Stuart argues that the testimony should not have been admitted and was so admitted in violation of his constitutional rights. The Warden, on the other hand, argues that the out-of-court statements regarding the child victim's alleged abuse were perfectly admissible under the Ohio Rules of Evidence and are not cognizable for federal habeas review.

As the parties both note, the provisions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) govern the Comi's review of this matter. See generally 28 U.S.C. § 2254(d). Under the AEDPA, the Court

cannot grant Stuart's petition for a writ of habeas corpus with respect to any claim adjudicated on the merits in the state court proceedings, unless the adjudication of that claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. Id.

Stuart contends that the AEDPA's applicability is limited in his case because there was no explanation for the state court's adjudication on the disposition of his merits claim. The Court, however, disagrees. In its opinion, the Court of Appeals for the Ninth District dealt with Stuart's constitutional arguments when it cited to the Supreme Court of Ohio's ruling in State v. Storch, 612 N.E.2d 305, 312 (1993) (holding that Ohio Rule of Evidence 807 is in accord with both the Sixth Amendment right to confrontation and the confrontation rights guaranteed by the Ohio Constitution). Although the state court's disposition of what it deemed Stuart's "summary argument that he was denied his right to confrontation at trial" may have been brief, the claim was indeed adjudicated on its merits. See generally State v. Stuart, No. 20111, 2001 WL 324387 at *8 (Ohio Ct. App. April 4, 2001). Accordingly, the Court must review Stuart's claim with the deference required by the AEDPA. Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003).

In his habeas petition, Stuart argues that the last reviewing state court's decision was contrary to clearly established Supreme Court precedent because the court failed to recognize that Stuart had the right to a fair trial or to confront his accusers. A state court's decision is contrary to clearly established Supreme Court precedent if it arrives at a conclusion opposition to that reached by the Court on a question of law, or if the state court "confronts facts that are materially indistinguishable from relevant Supreme Court precedent and arrives a result opposite to [that precedent]." Williams v. Taylor, 529 U.S. 362,405 (2000).

Stuart specifically challenges the trial court's finding that the child-victim was unavailable. He argues that such a finding was contrary to clearly established Supreme Court precedent. According to Stuart, the Supreme Court's decisions in Coy v. Iowa, 487 U.S. 1012 (1986) and Maryland v. Craig, 497 U.S. 836 (1990) require a substantial showing that a child witness is unavailable to testify. Such a substantial showing, he argues, was not made in his case. Specifically, Stuart argues that these cases require the trial court to make a finding that the child witness would suffer from emotional distress if forced to testify. He maintains that because there was no indication from the child-victim that he would be traumatized by having to testify in Stuart's presence, the trial court erred in admitting the testimony.

The state court's decision, however, was not contrary to the clearly established precedent set forth in the cases to

which Stuart cites. In White v. Illinois, 502 U.S. 346, 358 (1992), a case decided prior to Stuart's trial, the Supreme Court stated that Coy and Craig involved questions of only what in-court procedures are constitutional. According to the Court, these cases answered questions "quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations." Id. Furthermore, the Court refused to extend the holdings in Coy and Craig "into the much different context of out-of-court declaration admitted under established exceptions to the hearsay rule." Id. In other words, the Court limited its holdings in Coy and Craig to those cases involving in-court procedures. Accordingly, Stuart has not demonstrated that Supreme Court precedent required a contrary outcome.[4]

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[4]The Court recognizes that the recent Supreme Court case Crawford v. Washington. 124 S.Ct. 1354 (2004) could require a different outcome. The Court, however, need not consider Crawford under the AEDPA because it was not clearly established precedent at the time of the relevant state court decision. Lies v. Jackson. No. 03-1224,2004 WL 1203051 at *1 (6th Cir. May 24, 2004).

III. Conclusion

For the reasons set forth herein, this Court ADOPTS the Report of the Magistrate Judge as modified herein. Stuart's petition, therefore, is DISMISSED.

IT IS SO ORDERED.

December 13, 2004
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
Dec. 14, 2004

Northern District
of Ohio,
Clerk

TROY R. STUART,	)	
Petitioner,	)	**Case No. 5:03CV469**
	)	
v.	)	**Judge John R. Adams**
	)	
JULIUS WILSON, warden	)	**JUDGMENT ENTRY**
Respondent.	)	

For the reasons set forth in the Order filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Troy R. Stuart's Petition for Writ of Habeas Corpus is hereby DENIED.

IT IS SO ORDERED.

December 13, 2004
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge

Supreme Court, U.S.
FILED

Nº. 06-308 JUN 26 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

TROY R. STUART,
Petitioner,
v.
JULIUS WILSON, WARDEN,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

* Nathan A. Ray
ATTORNEY AT LAW
137 South Main Street
Suite 201, Delaware Building
Akron, OH 44308

(330) 253-7171

* *Counsel of Record*
Counsel for Petitioner

August, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

APPENDIX

NORTHERN DISTRICT OF OHIO FILING:

Report and Recommendation
of Magistrate Judge,
filed 03/12/04 ..... D1- D39

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
March 12, 2004
Northern District
of Ohio,
Clerk

TROY R. STUART,
Petitioner,

vs.

JULIUS WILSON, WARDEN,
Respondent.

Case No. 5:03CV469

JUDGE JOHN R. ADAMS
Magistrate Judge
George J. Limbert

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

On March 17, 2003, Troy R. Stuart, (hereinafter "Petitioner"), by and through counsel, filed a petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. Electronic Case Filing (hereinafter "ECF") Dkt. # 1. For the following reasons, the undersigned recommends that this Court DENY Stuart's petition for writ of habeas corpus.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. STATE PROCEEDINGS

On October 14, 1999, the Grand Jury for Summit County, Ohio returned a three-count indictment charging Petitioner with two counts of rape by force of a victim under thirteen years of age, in violation of Ohio Revised Code § 2907.02(A)(1)(B), and one count of gross sexual imposition of a victim under thirteen years of age, in violation of Ohio Revised Code § 2907.05(A)(4). Exhibit 1, Indictment.

On February 4,2000, the State of Ohio filed a notice of its intention to use the victim's out-of-court statement at trial pursuant to Rule 807 of the Ohio Rules of Evidence. Exhibit 5. In response, on February 10, 2000, Petitioner filed a motion to strike the "State's Motion for [Evidence Rule] 807 Hearing." Exhibit 3, Motion. On February 17, 2000, the trial court conducted an evidentiary hearing pursuant to Rules 803 and 807 of the Ohio Rules of Evidence. Exhibit 4, Hearing Transcript. At this hearing, the trial court and prosecution examined the victim and several other witnesses regarding the rapes. *Id.* Furthermore, Petitioner crossexamined the victim. *Id* at 17. On March 21, 2000, the trial Court ruled that the victim was competent to testify, but also that the victim was unavailable to testify pursuant to Rule 807(2) of the Ohio Rules of Evidence with regard to any substantive matters and issues before the trial court.

Accordingly, the trial court determined that the victim's out-of-court statements would be admissible at trial. Exhibit 8, Order. On March 24, 2000, the trial court denied reconsideration of this order. ECF Dkt. #25. Finally, on March 24, 2000, Petitioner filed a motion *in limine* seeking to preclude the victim's statement from being admitted into evidence. *Id.* The record reflects no ruling on this motion. Id

A jury trial commenced on March 27, 2000. Exhibit 9, Trial Transcript (Volume 1 of 3); Exhibit 10, Trial Transcript (Volume 2 of 3); Exhibit 11, Trial,Transcript (Volume 3 of 3). On March 31, 2000, the jury returned a guilty verdict on all three counts of the indictment, including all specifications. Exhibit 12, Guilty Verdicts. On April 3, 2000, the trial court issued its judgment entry of conviction. Exhibit 13, Judgment Entry.

On May 18, 2000, the trial court sentenced Petitioner to the following: (a) on Count One, rape, life imprisonment; (b) on Count Two, rape, life imprisonment; (c) on Count Three, gross sexual imposition, one year imprisonment; (d) counts to be served concurrently; (e) Petitioner was adjudicated to be a sexually oriented offender.[1] Exhibit 14,

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[1]On June 1,2000, the trial court issued a *Nunc Pro Tunc* sentencing order, in which it changed paragraph 4 of the original sentencing order dated May 18, 2000. However, the *Nunc Pro Tunc* order did not change the terms of imprisonment or the overall sentence. Exhibit 15, *Nunc Pro Tunc* Sentencing Order.

Judgment Entry (Sentencing); Exhibit 27, Sentencing Hearing Transcript.

On June 2, 2000, Petitioner, through counsel, filed a timely notice of appeal with the Ohio Court of Appeals for the Ninth Judicial District (hereinafter "Ninth District Court of Appeals"). Exhibit 16, Notice of Appeal. On October 18, 2000, Petitioner filed a brief and presented the following seven assignments of error:

1. EACH OF THE GUILTY VERDICTS IN THE INSTANT CASE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AT TRIAL HEREIN, AND ACCORDINGLY IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.
2. DEFENDANT'S CONVICTIONS HEREIN ARE BASED ON INSUFFICIENT EVIDENCE AND SHOULD THEREFORE BE REVERSED, AND FINAL JUDGMENT ENTERED FOR DEFENDANT. THESE CONVICTIONS, NOT SUPPORTED BY SUFFICIENT EVIDENCE, ARE IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.
3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING

DEFENDANT-APPELLANT'S PRETRIAL MOTION AND REQUEST TO EXCLUDE OUT-OF-COURT STATEMENTS BY THE ALLEGED VICTIM FROM BEING INTRODUCED THROUGH THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF EVID. R. 807 AND OF EVID. R. 802, AND BY ALLOWING SUCH HEARSAY TESTIMONY TO BE INTRODUCED BY THE STATE, OVER OBJECTION, AT TRIAL, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; THE TRIAL COURT COMMITTED FURTHER PREJUDICIAL ERROR BY FAILING TO RE-INTERVIEW THE ALLEGED VICTIM ON THE RECORD IMMEDIATELY PRIOR TO, OR DURING TRIAL, TO ESTABLISH WHETHER THE ALLEGED VICTIM WAS THEN ABLE TO TESTIFY CONCERNING THE ALLEGATIONS.

4. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 3, A HANDWRITING SAMPLE OF DEFENDANT, INTO EVIDENCE.

5. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 4 INTO EVIDENCE, IN VIOLATION OF

DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

6. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING A STATE'S WITNESS, LORIN STUART, TO TESTIFY, OVER OBJECTION, CONCERNING THE CONTENTS OF A LETTER DEFENDANT HAD ALLEGEDLY WRITTEN, WHICH LETTER COULD NOT BE PRODUCED BY THE STATE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

7. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT'S REQUEST TO CALL DYLAN STUART, A MINOR CHILD, AS A DEFENSE WITNESS, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Exhibit 17, Appellant's Brief. On April 4, 2001, the Ninth District issued an opinion addressing and overruling each of

Petitioner's assignments of error presented on direct appeal. (Exhibit 19, Opinion).

On May 18, 2001, Petitioner, through counsel, filed a timely notice of appeal with the Ohio Supreme Court. Exhibit 20, Notice of Appeal. In his memorandum in support of jurisdiction, Petitioner raised the following five propositions of law:

> **PROPOSITION OF LAW NO. I**: A DEFENDANT'S RIGHTS ARE VIOLATED WHEN A STATE'S WITNESS IS PERMITTED TO TESTIFY CONCERNING HIS RECOLLECTION OF THE CONTENTS OF A LETTER ALLEGEDLY WRITTEN BY THE DEFENDANT WHEN THE ALLEGED LETTER IS NEVER PRODUCED BY THE STATE AT TRIAL, WHEN THERE IS NO INDICATION THAT THE INFLAMMATORY STATEMENTS ALLEGEDL Y CONTAINED IN THE LETTER HAD ANY CONNECTION WITH THE SEXUAL ABUSE ALLEGEDLY COMMITTED AGAINST THE VICTIM, AND WHEN THERE IS NO DEFINITIVE PROOF THAT THE DEFENDANT WROTE THE LETTER OR THAT THE LETTER EVER, IN FACT, EXISTED.
>
> **PROPOSITION OF LAW NO. II**: A DEFENDANT'S CONVICTIONS FOR RAPE AND GROSS SEXUAL IMPOSITION BASED UPON EVIDENCE OF CERTAIN OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE CHILD VICTIM AND INTRODUCED AT TRIAL

THROUGH THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF EVIDENCE RULES 802 AND 807, ARE VIOLATIVE OF THE DEFENDANT'S CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE RIGHT TO CONFRONTATION AS SET FORTH IN THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. III: A TRIAL COURT COMMITS PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE A STICK-FIGURE DRAWING OF A SEXUAL NATURE, WHEN THERE IS NO EVIDENCE THAT THE DRA WING WAS MADE BY OR IN ANY WAY CONNECTED WITH THE ACCUSED.

PROPOSITION OF LAW NO. IV: APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, ACCORDINGLY, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

PROPOSITION OF LAW NO. V: APPELLANT'S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE AND IS IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM UNDER THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION .

Exhibit 21, Memorandum in Support of Jurisdiction, at v-vi. On June 7, 2001, the State of Ohio filed a memorandum in response to jurisdiction. Exhibit 22, Response Memorandum. On July 25,2001, the Ohio Supreme Court denied Petitioner leave to appeal and dismissed Petitioner's appeal as not involving any substantial constitutional question. Exhibit 23, Order.

On October 23,2001, Petitioner, through counsel, filed a Petition for Writ of Certiorari in the United States Supreme Court and raised the following question presented for review:

> WHETHER, BEFORE A CHILD'S OUT-OF-COURT STATEMENTS ARE ADMISSIBLE, THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO SHOW THAT THE CHILD WITNESS IS UNAVAILABLE FOR TRIAL, AND IF SO, WHAT THAT SHOWING REQUIRES?

Exhibit 25, Petition for Writ of Certiorari. On March 18,2002, the United States Supreme Court denied the Petition for Writ of Certiorari. Exhibit 26, Order Denying Certiorari.

B. FEDERAL HABEAS CORPUS

On March 17, 2003, Petitioner, through counsel, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, stating three claims for relief, to-wit, grounds three, four, and five. ECF Dkt. #1. On July 9,2003, Warden

Julius Wilson (hereinafter "Respondent" filed his answer/return of writ and moved this Court to dismiss the instant petition. ECF Dkt. # 11. Subsequently, Petitioner filed a motion for leave to file a corrected memorandum in support of his petition for writ of habeas corpus. ECF Dkt. #20. On September 2,2003, the undersigned granted Petitioner's motion for leave. ECF DkL#21. On September 2,2003, Petitioner filed his corrected memorandum in support of his petition for writ of habeas corpus, in which he added additional claims for relief, namely, grounds one and two. ECF Dkt. #22. Overall, Petitioner has set forth the following five grounds for relief:

> **GROUND FOR RELIEF NO. 1**: PETITIONER STUART'S UNITED STATES CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN A STATE'S WITNESS WAS PERMITTED TO TESTIFY CONCERNING HIS RECOLLECTION OF THE CONTENTS OF A LETTER ALLEGEDLY WRITTEN BY THE PETITIONER WHEN THE ALLEGED LETTER WAS NEVER PRODUCED BY THE STATE AT TRIAL, WHEN THERE WAS NO INDICATION THAT THE INFLAMMATORY STATEMENTS ALLEGEDLY CONTAINED IN THE LETTER HAD ANY CONNECTION WITH THE SEXUAL ABUSE ALLEGEDLY COMMITTED AGAINST THE VICTIM IN THIS CASE, AND WHEN THERE WAS NO DEFINITIVE PROOF THAT PETITIONER WROTE

THE LETTER OR THAT THE LETTER EVER, IN FACT, EXISTED.

GROUND FOR RELIEF NO. 2: PETITIONER STUART'S CONVICTIONS FOR RAPE AND GROSS SEXUAL IMPOSITION, BASED UPON EVIDENCE OF CERTAIN OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE CHILD VICTIM AND INTI ODUCED AT TRIAL THROUGH THE TESTIMONY OF OTHER WITNESSES, ARE VIOLATIVE OF THE PETITIONER'S CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE RIGHT TO CONFRONTATION AS SET FORTH IN THE UNITED STATES CONSTITUTION.

GROUND FOR RELIEF NO. 3: A TRIAL COURT COMMITS PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE A STICK-FIGURE DRAWING OF A SEXUAL NATURE, WHEN THERE IS NO EVIDENCE THAT THE DRA WING WAS MADE BY OR IN ANY WAY CONNECTED WITH THE ACCUSED.

GROUND FOR RELIEF NO. 4: PETITIONER STUART'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, ACCORDINGLY, IN VIOLATION OF PETITIONER'S UNITED STATES CONSTITUTIONAL RIGHTS.

GROUND FOR RELIEF NO. 5: PETITIONER STUART'S CONVICTION WAS BASED UPON

INSUFFICIENT EVIDENCE AND IS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM UNDER THE UNITED STATES CONSTITUTION.

ECF Dkt. #22, Corrected Memorandum in Support, at 7-13. On October 20,2003, Respondent filed his supplemental answer/return of writ. ECF Dkt. #25. On December 3,2003, Petitioner filed his traverse to Respondent's answer/return of writ. ECF Dkt. #28. Finally, on December 15, 2003, Respondent filed his reply brief to Petitioner's traverse. ECF Dkt. #29.

II. STANDARD OF REVIEW

A. PROCEDURAL BARRIERS TO REVIEW

Petitioner brought the instant petition for writ of habeas corpus pursuantto 28 U.S.L § 2254, whereby a state prisoner is entitled to relief ifhe is held in custody in violation of the U.S. Constitution or laws or treaties ofthe United States. 28 U.S.L § 2254(d). However, a petitioner must overcome several procedural barriers before a court will review the merits of the petition for writ of habeas corpus. As Justice O'Connor noted in *Daniels v. United States, infra,* "Procedural barriers, such as statutes of limitations[2] and rules

[2] As a threshold matter, the AEDPA contains a one-year statute of limitations that applies to petitions filed pursuant to

concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." *Daniels v. United States*, 532 U.S. 374, 381 (2001); *see also United States v. Olano*, 507 U.S. 725, 731 (1993).

First, as a general rule, a state prisoner must exhaust all possible state remedies or have no remaining state remedies before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b)and (c); *see also Baldwin v. Reese*, 541 U.S. ___ (March 2, 2004). The exhaustion requirement is satisfied "once the federal claim has been fairly presented to the state courts." *Franklin v. Rose*, 811 F.2d 322,325 (6th Cir. 1987). To exhaust a claim, a petitioner must present it "to the state courts under the same theory in which it is later presented in federal court." *Wong v.*

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28 U.S.C. § 2254. The one-year statute of limitations is found in 28 U.S.C. § 2244(d), and for purposes of this inquiry, begins to run on the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Here, the United States Supreme Court denied Petitioner's Petition for the Writ of Certiorari on March 18, 2002, thereby concluding the direct review of Petitioner's claims. Thus, Petitioner's conviction and sentence became final on March 18,2002, and he had until March 18,2003 in which to file his petition for writ of habeas corpus. Petitioner filed the instant petition on March 17,2003, and as such, the Court finds that the petition is timely filed under Section 2244.

Money, 142 F.3d 313, 322 (6th Cir. 1998); *see also McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). General allegations ofthe denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated. *Id* (citing *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984)).

Unless an exception applies, a petition must be dismissed for lack of exhaustion if it contains at least one issue which was not presented to the state courts so long as a remedy is still available for the petitioner to pursue in the state courts. *Rose v. Lundy*, 455 U.S. 509, 518-20, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982). The Supreme Court has held that "the petitioner has the burden ... of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist." *Darr v. Burford*, 339 U.S. 200, 218-19 (1950), *overruled in part on other grounds, Fay v. Noia*, 372 U.S. 391 (1963). A petitioner will not be allowed to present claims never before presented in the state courts unless he can show cause to excuse his failure to present the claims in the state courts and actual prejudice to his defense at trial or on appeal, or that he is actually innocent of the crime for which he was convicted. *Coleman v. Thompson*, 501 U.S. 722, 748 (1991).

Moreover, the procedural default doctrine also serves to bar review of federal claims that a state court has declined to address because of the petitioner's noncompliance with a state procedural requirement. *Wainwright v. Sykes*, 433 U.S.

72, 87 (1977). In these cases, "the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). However, when the last explained state court decision rests upon procedural default as an "alternative ground," a federal district court is not required to reach the merits ofa habeas petition. *McBee v. Abramajtys*, 929 F.2d 264, 265 (6th Cir. 1991). In determining whether a state court has addressed the merits of a petitioner's claim, federal courts must rely upon the presumption that there is no independent and adequate state grounds for a state court decision absent a clear statement to the contrary. *See Coleman*, 501 U.S. at 735. Applying this presumption, the Sixth Circuit Court of Appeals established a four-pronged analysis to determine whether a claim has been procedurally defaulted. *See Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986). Under the *Maupin* test, a reviewing court must decide:

(1) whether the petitioner failed to comply with an applicable state procedural rule;

(2) whether the state courts actually enforced the state procedural sanction;

(3) whether the state procedural bar is an "adequate and independent" state ground on which the state can foreclose federal review; and

(4) if the above are met, whether the petitioner has demonstrated "cause" and "prejudice."

Id at 138.

As set forth in the *Maupin* test, a claim that is procedurally defaulted in state court will not be reviewable in federal habeas corpus unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 751 (1991). "Cause" is a legitimate excuse for the default, and "prejudice" is actual harm resulting from the alleged constitutional violation. *See Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984), *cert. denied*, 490 U.S. 1068 (1985). If a petitioner fails to show cause for his procedural default, the reviewing court need not address the issue of prejudice. *See Smith v. Murray*, 477 U.S. 527 (1986).

The above standards are applicable to the review of Petitioner's claims.

B. STANDARD OF REVIEW FOR THE MERITS OF A CLAIM

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 governs this Court's review of the instant case because Petitioner filed his petition for habeas

corpus relief on November 17, 2002, well after the Act's effective date of April 26, 1996. *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). If a habeas corpus petitioner overcomes the procedural obstacles as described in the foregoing section, the AEDPA sets forth the standard of review for the merits of a petition for the writ of habeas corpus. The AEDPA provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable *application of*, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added). After the AEDPA took effect, courts applied varying interpretations ofthe standards set forth in 28 U.S.C. § 2254(d). In *Williams v.*

Taylor, infra, the Supreme Court clarified the language of 28 U.S.C. § 2254(d) and stated:

> Under the "contrary to" clause, a federal habeas court may grant the writ ifthe state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ ifthe state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Supreme Court also noted that a "state-court opinion can also engender the 'unreasonable application' of Supreme Court precedent if it 'either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context.'" *Williams*, 529 U.S. at 409. Furthermore, the Supreme Court declared that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Elaborating on the term "objectively unreasonable," the Court stated that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

Finally, a reviewing federal court is bound by the presumption of correctness, under which the federal court is obligated to "accept a state court's interpretation of the state's statutes and rules of practice." *Hutchinson v. Marshall*, 744 F.2d 44, 46 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985); *see also Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). The presumption of correctness is set forth in 28 U.S.C. § 2254(e), which provides:

> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

28 U .S.C. § 2254(e). The presumption of correctness applies to basic primary facts, and not to mixed questions of law and fact. *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir.), *cert. denied*, 509 U.S. 907 (1993). The presumption also applies to "implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997). Furthermore, a reviewing federal court is not free to ignore the pronouncement ofa state appellate court on matters of law. *See Central States, Southeast & Southwest Areas Pension*

Fund v. Howell, 227 F.3d 672, 676, n.4 (6th Cir. 2000). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(l).

III. DISCUSSION

Based upon the applicable standards of review, the undersigned recommends that the Court deny the instant petition for writ of habeas corpus because several of the claims contained in the first, second, and third grounds for relief are not cognizable on federal habeas review, and because Petitioner has procedurally defaulted the remaining claims contained in his first, second, and third grounds for relief, and because the fourth ground for relief is not cognizable on federal habeas review, and also because the fifth ground for relief is without merit.

A. PETITIONER'S FIRST GROUND FOR RELIEF

In his first ground for relief, Petitioner alleges that the state trial court erred by allowing Lorin Stuart, a witness for the State of Ohio, to testify as to his recollection of the contents of a letter written by the Petitioner. At trial, Lorin Stuart testified that he found a letter in Petitioner's bedroom and that the letter was in Petitioner's handwriting. Trial

Transcript, Exhibit 10, at 242- 245. The letter was apparently lost, and Lorin Stuart testified that the letter stated:

> To whom it may concern, but I have monsters too. Since I was three or four, until I was ten or eleven, I have been preyed upon by family members, family friends, including a sister. Everybody thinks that I'm gay. I am not gay. Because of what men have done to me all of you wonder why I don't have a girlfriend, I'm scared. Women are scary for what they have done to me. So I prey upon kids because they don't hurt me. All of you wondered why I don't have a girlfriend. I'm afraid that if we got serious, we would have kids, and I would prey upon them, too.

Id. at 244-45.

In his supporting memorandum, Petitioner argues that trial court erred in admitting the testimony of Lorin Stuart as to the contents of the letter because the State of Ohio failed to present any definitive proof to show that the letter even existed. ECF Dkt. #22, at 8. Next, Petitioner argues that the testimony was inadmissible hearsay. *Id.* Finally, Petitioner argues that the probative value of the testimony regarding the contents of the letter is far outweighed by the unfair prejudice resulting from the admission of said testimony. *Id.*

Respondent argues that Petitioner's claims under his first ground for relief are not cognizable on federal habeas review to the extent that they rest on errors of the application

of the Ohio Rules of Evidence. "Errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." Walker v. Engle, 703 F.2d 959, 962 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983); *see also Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). "It is not the province ofa federal habeas court to re-examine state-court determinations of state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). However, when an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief. *Coleman*, 244 F.3d at 542; *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

Based on the foregoing, the undersigned finds that the three claims contained in the first ground for relief are not cognizable on federal habeas review. Indeed, Petitioner's contentions that the state courts misapplied the Ohio Rules of Evidence challenges the state courts' application of state law. Such challenges are not cognizable in a federal habeas corpus proceeding. Thus, the undersigned recommends that this Court overrule Petitioner's first ground for relief to the extent that Petitioner challenges the state courts' application of state law.

Moreover, in his traverse, Petitioner argues for the first time that the admission of the testimony regarding the contents of the letter was fundamentally unfair, in violation of Petitioner's federal due process rights. ECF Dkt. #28, at 5-7. Petitioner claims that there was no physical evidence of any

rape or gross sexual imposition, and the admission of the contents ofthe letter was so grossly prejudicial that it fatally infected the trial.

As an initial matter, the Court notes that Petitioner did not raise this claim in his original petition or amended petition for the writ of habeas corpus, or raise it in any state proceeding. Instead, Petitioner raised this issue for the first time in his traverse. ECF Dkt. #28, at 5. Such action is disfavored. *Taylor v. Mitchell*, 296 F. Supp; 2d 784, 798 (N.D. Ohio 2003). In general a traverse is not the proper pleading in which to raise new issues because it does not adequately notify the state of the claim or permit the state an opportunity to oppose it. *Id.* (citing *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Jack v. Randall*, No. C-2-99-947, *unreported*, 2000 WL 1456992, at * 7 (S.D. Ohio June 20, 2000) (prohibiting habeas petitioner from asserting new claim in traverse to which respondent had no opportunity to respond)). Because, in this case, Respondent was afforded the opportunity to respond to this claim in the reply to Petitioner's traverse (ECF Dkt. #29), however, it is not inherently prejudicial to Respondent for this Court to review this claim.

With this in mind, Respondent concedes that this argument is cognizable on federal habeas review because it implicates federal due process. However, Respondent argues that Petitioner has waived this claim because Petitioner did not fairly present this argument to the state courts.

As discussed above, in order to satisfy the exhaustion requirement, a petitioner must fairly present his federal claim to the state courts or have no remaining state remedies available. 28 U.S.C. § 2254(b) and (c); *Franklin*, 811 F.2d at 325. However, the United States Supreme Court has held that a petitioner procedurally defaults a claim for purposes of federal habeas review if he fails "to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). In other words, a petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to said claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *Id*; *Mikesell v. Conley*, 51 Fed. Appx. 496, 505-06 (6th Cir October 21, 2002). Thus, when a petitioner fails to fully and fairly present his claims to the state courts before the time for him to do so has expired, he procedurally defaults and is foreclosed from federal habeas corpus review of those claims, absent a showing of cause and prejudice or a fundamental miscarriage of justice. *In re Cook*, 215 F.3d 606, 608 (6th Cir 2000).

In the case at bar, the undersigned notes that although Petitioner did mention in minimal passing the Fifth, Sixth, and Fourteenth Amendments in both his appeal to the Ninth District Court of Appeals and his memorandum in support of

jurisdiction to the Ohio Supreme Court, he never raised the claim that the admission of this testimony of Lonn Stuart regarding the contents of the letter was fundamentally unfair, in violation of his federal due process rights. Rather, from the outset, Petitioner simply argued that the trial court misapplied Ohio evidentiary law. Consequently, the Ohio courts rendered their opinions based solely on Ohio law and did not discuss any federal due process violation. Therefore, the undersigned finds that Petitioner failed to fairly present his federal due process argument to the Ohio courts and in doing so, deprived the state courts of the opportunity to resolve the federal constitutional claim contained therein.

However, even though Petitioner failed to present this federal claim to the Ohio courts, it appears that Petitioner has no state remedies remaining in which he could raise the federal claim because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21 (A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. In addition, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to this claim because there are no available remedies for the petitioner to pursue in the state courts. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to this claim.

Nevertheless, this Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Instead, Petitioner must still satisfy the procedural default requirements before this Court can reviews the merits of Petitioner's federal due process claim. As discussed above, a petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to the claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *In re Cook*, 215 F.3d at 608. Here, Petitioner failed to fully and fairly present his federal due process claim to the state courts before the time limit for him to do so expired. Accordingly, the undersigned finds that Petitioner has procedurally defaulted his federal due process claim. Thus, Petitioner is foreclosed from federal habeas corpus review of this claim.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the federal due process challenge to the state courts, nor does he demonstrate that failure to consider this claim will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's first ground for relief to the extent that it raises for the first time a claim that the admission of the testimony was fundamentally unfair, in violation of federal due process because Petitioner has procedurally defaulted said claim.

B. PETITIONER'S SECOND GROUND FOR RELIEF

In his second ground for relief, Petitioner claims that the trial court erred in allowing the out-of-court statements of the victim, a five-year-old child, to be introduced at trial through the testimony of other witnesses. Before the trial, the state of Ohio filed a notice of its intention to use the victim's out-of-court statement at trial pursuant to Rule 807 of the Ohio Rules of Evidence. Rule 807 sets forth an exception to the hearsay rule that allows, under certain circumstances, the out-of-court statements made by a child, who is under twelve years of age at the time of trial, describing any sexual act performed by, with, or on the child. OHIO R. EVIDENCE 807(a).

On February 17, 2000, the trial court conducted an evidentiary hearing pursuant to Rule 803 of the Ohio Rules of Evidence in order to determine if the victim was competent to testify at trial, and if so, if the victim was available to testify at trial. At the hearing, the trial court and the prosecuting attorney examined the victim. Hearing Transcript, ECF Dkt. #4. In addition, defense counsel cross-examined the victim. *Id.* at 17.

On March 21, 2000, the trial court issued an order, in which it concluded that the victim was competent to testify. ECF Dkt. #8. Then, the trial court considered whether the victim was available to testify at the trial pursuant to Rule 807

ofthe Ohio Rules of Evidence. *Id.* The trial court noted that the victim initially responded well to neutral, non-emotional questions unrelated to sexual activity. ECF Dkt. #8, at 2. However, the court noted that when the victim was asked about matters or details of a sexual nature, he became sullen, fidgety, unresponsive and was hiding his face. The court also stated that any response by the victim was negativistic, and he always responded "no" if pressed, encouraged or cajoled to respond. Thus, the trial court concluded that the victim was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Petitioner. *Id.* The trial court also opined that it was clear that although the victim was physically present and competent to testify, he was unavailable to testify relative to any substantive matters and issues before the court. *Id.* at 3. Based on these findings, the trial court concluded that the victim was not reasonably available to testify at Petitioner's trial. *Id.* The trial court then considered the elements of Rule 807 with regard to whether the victim's out-of-court statements were admissible and concluded that the statements were indeed admissible. *Id.* at 5-6.

In his memorandum in support of his petition for habeas corpus, Petitioner alleges that the trial court erred in admitting the out-of-court statements of the victim. Specifically, Petitioner alleges that the trial court improperly concluded under Rule 807 oftheOhio Rules of Evidence that the victim was unavailable to testify. Indeed, Petitioner claims

that the victim's statements did not contain a guarantee of trustworthiness, did not set forth a specific time frame, were not offered spontaneously, and were not reasonably obtainable. Petitioner also argues that there was no independent proof of the alleged sexual acts committed by Petitioner.

Conversely, Respondent argues that Petitioner's claims regarding the trial court's determination that the victim was unavailable to testify pursuant to Rule 807 of the Ohio Rules of Evidence are not cognizable on federal habeas review. As discussed in the preceding section, errors in the application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Walker*, 703 F.2d at 962. Petitioner's contentions that the state courts misapplied Rule 807 and erroneously declared the victim was unavailable to testify solely challenge the state courts' application of state law. Such challenges are not cognizable in a federal habeas corpus proceeding. Further, Petitioner makes no argument, nor has he ever argued, that the admission of the out-of-court statements was fundamentally unfair, in violation of Petitioner's federal due process rights. Thus, the undersigned recommends that this Court overrule Petitioner's second ground for relief to the extent that Petitioner challenges the state courts' application of Rule 807 of the Federal Rules of Civil Procedure.

In addition, in his memorandum in support of his petition for habeas corpus, Petitioner states in conclusory fashion that the admission of the out-of-court statements of the victim violated his right to due process and his right to confrontation as set forth in the United States Constitution. However, Petitioner does not explain how these rights were violated. In his traverse, Petitioner specifically discusses for the first time how his right to confrontation was violated, but again fails to discuss how his federal due process rights were violated.

In response, Respondent argues that Petitioner has failed to exhaust his state remedies with regard to these two federal claims because he has failed to fairly present these claims to the Ohio courts.

The undersigned notes that Petitioner did mention in minimal passing that the admission of the out-of-court statements violated his right to due process and right to confrontation in both his appeal to the Ninth District Court of Appeals and his memorandum in support of jurisdiction to the Ohio Supreme Court. ECF Dkt. # 17, at 14, 17; ECF Dkt. #21, at 8, 10 Aside from these generalized, conclusory remarks, however, Petitioner did not discuss the substantive law regarding these federal claims in any state court proceeding, or rely upon any federal or state cases employing federal constitutional analysis. Rather, from the outset, Petitioner simply alleged that trial court misapplied Ohio evidentiary law in determining that the victim was unavailable

to testify, and admitting the out-of-court statements at trial. Consequently, the Ohio courts rendered their opinions based solely on Ohio law and did not discuss any federal claims. Therefore, the undersigned finds that Petitioner failed to fairly present the two federal claims contained in his second ground for relief to the state courts.

However, even though Petitioner has failed to present these federal claims to the Ohio courts, it appears that Petitioner has no available state remedies in which he could raise the federal claims because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21(A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. Moreover, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to his federal due process claim and his federal right to confrontation claim because there are no available remedies for the petitioner to pursue in the state courts. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to these two federal claims.

As discussed in the preceding section, this Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Petitioner must still satisfy the procedural default requirements before this Court can reviews

the merits of the two federal claims asserted in his second ground for relief A petitioner procedurally defaults a claim when he fails to exhaust all available state remedies with respect to the claim, and the state court to which he would be required to present the claim to would now find that the claim is procedurally barred. *In re Cook*, 215 F.3d at 608. Here, Petitioner failed to fully and fairly present his federal claims to the state courts before the time limit for him to do so expired. Accordingly, the undersigned finds that Petitioner has procedurally defaulted his federal due process claim and his federal claim under the confrontation clause, and is now foreclosed from federal habeas corpus review of these claims.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the above-mentioned federal claims to the state courts, nor does he demonstrate that failure to consider these claims will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's second ground for relief to the extent that it raises for the first time that the admission of the out-of-court statements of the victim violated his federal constitutional rights of due process and to confront the witness against him because Petitioner has procedurally defaulted such claims.

C. PETITIONER'S THIRD GROUND FOR RELIEF

In his third ground for relief, Petitioner argues that the trial court committed prejudicial error by allowing into evidence a stick-figure drawing of a sexual nature that was found in Petitioner's bedroom. ECF Dkt. #22, at 11. Over the objection of Petitioner, the trial court allowed the state of Ohio to submit as evidence a drawing that depicted two male figures, one larger than the other, involving a penis and testicles. Petitioner avers that there was no evidence that the drawing was made by Petitioner, that the drawing was not relevant, and that the admission of this exhibit unfairly prejudiced him and denied him his rights as guaranteed by the United States Constitution.

As discussed in the preceding sections, errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Walker*, 703 F.2d at 962. However, when an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief. *Coleman*, 244 F.3d at 542.

In light of the foregoing, the undersigned finds that the claims that the drawing was improperly admitted into evidence are not cognizable on federal habeas review because such claims are based solely on the application of the Ohio Rules of Evidence. Accordingly, such challenges are not

cognizable in a federal habeas corpus proceeding. Therefore, the undersigned recommends that this Court overrule Petitioner's third ground for relief to the extent that Petitioner challenges the state courts' application of state law with regard to the admission of the drawing into evidence.

Moreover, in his traverse, Petitioner argues for the first time that the admission of the drawing was fundamentally unfair, in violation of Petitioner's federal due process rights. ECF Dkt. #28, at 14. Petitioner argues that there was no physical evidence of any rape or gross sexual imposition presented at trial, and that the admission of the drawing, which was of a sexual nature, rendered the trial fundamentally unfair.

Respondent concedes that Petitioner's fundamental fairness claim is cognizable on federal habeas review because it implicates federal due process. However, Respondent argues that Petitioner has failed to exhaust his state remedies with respect to this argument because he did not fairly present it to the state courts.

Upon review of the record, the undersigned notes that in his appeal to the Ninth District Court of Appeals, Petitioner does mention in the caption of his Fifth Assignment of Error that the admission of the drawing violated his rights as guaranteed to him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. But, Petitioner does not discuss which right or rights were violated. Moreover, in his memorandum in support of

jurisdiction to the Ohio Supreme Court, Petitioner discusses that the evidence was improperly admitted solely under Ohio law and he does not even mention that the admission of this evidence violated his federal constitutional rights. ECF Dkt. #21, at 11. Therefore, the undersigned finds that Petitioner failed to fairly present his federal due process argument to the Ohio courts.

However, even though Petitioner failed to present his federal due process claim to the Ohio courts, it appears that Petitioner has no state remedies remaining in which lie could raise the federal claim because the time limitations in which to file a petition for state post-conviction relief under Ohio Revised Code § 2953.21(A)(2) and Ohio Revised Code § 2953.23(A) have long since expired. Moreover, Petitioner has set forth no facts pursuant to Ohio Revised Code § 2953.23(A) that would allow him to file a state post-conviction petition outside the applicable time limitations. Thus, it appears as if Petitioner has technically exhausted his state remedies with regard to this claim because there are no available state remedies for the petitioner to pursue. Accordingly, the undersigned finds that Petitioner has exhausted his state remedies with regard to his federal due process claim.

This Court's inquiry does not end with the finding that Petitioner has exhausted his state remedies. Instead, Petitioner must still satisfy the procedural default requirements before this Court can reviews the merits of Petitioner's federal due

process claim. Again, the undersigned finds that Petitioner has procedurally defaulted this claim because he failed to fully and fairly present this claim to the state courts before the time for him to do so expired. *In re Cook*, 215 F.3d at 608. Accordingly, Petitioner is foreclosed from federal habeas corpus review of this claim.

Furthermore, Petitioner has not shown cause for, or prejudice resulting from, his failure to present the federal due process challenge to the state courts, nor does he demonstrate that failure to consider this claim will result in a fundamental miscarriage of justice. Accordingly, the undersigned recommends that this Court dismiss Petitioner's first ground for relief to the extent that it raises for the first time a claim that the admission of the testimony was fundamentally unfair, in violation of federal due process.

D. PETITIONER'S FOURTH GROUND FOR RELIEF

In his fourth ground for relief, Petitioner argues that his conviction on each count was against the manifest weight of the evidence. However, Petitioner subsequently abandoned his weight of the evidence claim in light of the fact that a federal habeas court has no power to grant habeas relief on the ground that a state conviction is against the weight of the evidence. ECF Dkt. #28, at 15; *see Walker v. Engle*, 703 F.2d 959, 969 (6th Cir. 1983)(*citing Pigford v. United States*, 518

Fold 831, 836 (4th Cir. 1975). Based on the foregoing, the undersigned recommends that this Court overrule Petitioner's fourth ground for relief.

E. PETITIONER'S FIFTH GROUND FOR RELIEF

In his fifth ground for relief, Petitioner argues that his conviction was based upon insufficient evidence, and therefore violated his federal due process rights. ECF Dkt. #22, at 13. Specifically, Petitioner alleges that the state failed to present any physical evidence linking Petitioner to the alleged crimes or any independent eyewitness testimony. *Id.* In addition, Petitioner did not confess to the crimes. *Id.* Petitioner further alleges that the evidence the state did produce, such as the testimony of the father of the victim regarding the contents of the letter, the stick-figure drawing, and the hearsay testimony of several witnesses, were all insufficient to support the convictions of rape and gross sexual imposition. *Id.*

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court set forth the standard for deciding whether evidence is constitutionally insufficient to sustain convictions. The inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319.

Circumstantial evidence may be sufficient to support a conviction. *United States v. Stone*, 748 F.2d 361, 363 (6th Cir.1984). Finally, it is well established that the trier of fact at the state court level bears primary responsibility to choose which testimony or evidence to believe, and that a credibility determination by a state court is entitled to a presumption of correctness so long as the determination is fairly supported by the record. *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983); 28 U.S.C. § 2254(d).

After reviewing the record, weighing the evidence and all reasonable inferences, taking into consideration the testimony of the witnesses regarding the victim's disclosure of the two instances of rape, the corroborating evidence such as the contents of the letter and the stick-figure drawing, and the jury's determination of the credibility of the police and lay witnesses, the Court finds that viewing the evidence in the light most favorable to the government, a rational trier of fact could have found beyond a reasonable doubt that Petitioner committed rape and gross sexual imposition.

Finally, Petitioner has failed to establish that the state court analysis of his insufficient evidence claim was contrary to, or an unreasonable application of, federal law. The Ninth District Court of appeals correctly applied the *Jackson v. Virginia* standard as discussed above. ECF Dkt. #19, at 3-4 (the Ninth District Court of Appeals applied *State v. Jenks*, 61 Ohio St.3d 259 (1991), in which the Ohio Supreme Court applied the *Jackson v. Virginia* standard of review to

sufficiency of evidence claims). Thus, the undersigned finds that Petitioner's fifth ground for relief is without merit. Accordingly, the undersigned recommends that this Court overrule Petitioner's fifth ground for relief.

III. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the undersigned finds that Petitioner's five grounds for relief are without merit. Accordingly, the undersigned recommends that this Court dismiss the instant petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 with prejudice.

Date: March 12, 2004

/s/ George J. Limbert
GEORGE J. LIMBERT
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).